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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 CHARLES EASTER,) Civil No. 09cv555 LAB(RBB)
11)
12 Plaintiff,) **ORDER DENYING PLAINTIFF'S**
13) **MOTION FOR ADDITIONAL**
14 v.) **DISCOVERY AND REPORT AND**
15) **RECOMMENDATION DENYING**
16 CDC, State of California; B.) **DEFENDANTS MORRIS, PANICHELLO,**
MORRIS, Captain; L. PANICHELLO,) **AND PEREZ'S MOTION FOR SUMMARY**
Lieutenant; E. PEREZ,) **JUDGMENT [ECF NO. 52]**
Correctional Officer,)
Defendants.)
_____)

17 Plaintiff Charles Easter, a former state prisoner proceeding
18 pro se and in forma pauperis, filed a civil rights complaint on
19 March 18, 2009, pursuant to 42 U.S.C. § 1983 [ECF No. 1].¹ The
20 events giving rise to the allegations in the Complaint, however,
21 occurred approximately two and one-half years earlier, while Easter
22 was housed at R.J. Donovan Correctional Facility ("Donovan").
23 (Compl. 1, ECF No. 1.)² In the Complaint, Plaintiff asserts
24 Defendants violated his rights protected by the Fifth, Eighth, and
25 _____

26 ¹ Because the Complaint and attachments are not consecutively
27 paginated, the Court will cite to the Complaint using the page
numbers assigned by the Court's electronic case filing system.

28 ² During the course of this action, Easter has been in and
out of prison.

1 Fourteenth Amendments of the United States and the California
 2 Constitutions when they placed Easter in a prison yard where he had
 3 been assaulted by other inmates on a previous occasion, which
 4 caused him to be assaulted a second time. (Id. at 3-6.)

5 United States District Court Judge Larry A. Burns dismissed
 6 Defendant "CDC State of California" sua sponte on June 1, 2009 [ECF
 7 No. 7]. Then, on August 14, 2009, the remaining three Defendants,
 8 Officer E. Perez, Lieutenant L. Panichello,³ and Captain B. Morris
 9 filed a Motion to Dismiss Plaintiff's Complaint for Failure to
 10 State a Claim [ECF No. 15]. On February 1, 2010, this Court
 11 recommended that the district court grant in part and deny in part
 12 Defendants' Motion to Dismiss, and on March 9, 2010, Judge Burns
 13 adopted the recommendation in its entirety [ECF Nos. 29-30].
 14 Specifically, the monetary claims against Defendants Perez,
 15 Panichello, and Morris in their official capacities were dismissed
 16 without leave to amend, as were the supplemental state law claims
 17 against Defendants in their official capacities. (Order Adopting
 18 Report & Recommendation 2, ECF No. 30; see also Report &
 19 Recommendation 24-25, ECF No. 29.) Easter's claim under the
 20 Fourteenth Amendment was dismissed without leave to amend, and his
 21 Fifth Amendment claim was dismissed with leave to amend. (Id.)
 22 Finally, Plaintiff's request for injunctive relief was stricken.
 23 (Order Adopting Report & Recommendation 3, ECF No. 30; see also
 24 Report & Recommendation 25, ECF No. 29.) Plaintiff did not amend

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 26
 27 ³ Although initially sued as Lieutenant Panchello,
 28 Defendant's name has been corrected to Lieutenant L. Panichello, to
 add his first-name initial. (See Report & Recommendation 2 n.1,
 ECF No. 29 (citing Compl. 1-2, 4, ECF No. 1; Mot. Dismiss Attach.
 #2 Mem. P. & A. 1-2, ECF No. 15).)

1 his Complaint, and on May 14, 2010, the three Defendants filed an
2 Answer [ECF No. 32].

3 On January 3, 2011, Defendant Morris, Panichello, and Perez's
4 Motion for Summary Judgment was filed, along with a Memorandum of
5 Points and Authorities,⁴ a Separate Statement of Undisputed Facts,
6 and an Appendix of Evidence [ECF No. 52].⁵ The next day, Plaintiff
7 was given notice, pursuant to Rand v. Rowland, 154 F.3d 952 (9th
8 Cir. 1988) (en banc), and Klingeale v. Eikenberry, 849 F.2d 409 (9th
9 Cir. 1988), of his opportunity to submit additional evidence in
10 opposition to Defendants' Motion for Summary Judgment [ECF No. 53].
11 The Court instructed that any opposition must be filed by January
12 24, 2011, and any reply must be filed by January 31, 2011.
13 (Klingeale/Rand Notice 2-3, ECF No. 53.)

14 Easter's fluctuating mailing addresses have challenged the
15 Clerk of Court's ability to ensure that he receives copies of court
16 documents. Since the Defendants filed their Motion for Summary
17 Judgment, Plaintiff has filed five notices of change of address in
18 an attempt to keep the Court apprised of his current mailing
19 address [ECF Nos. 54-55, 58, 65, 67]. Easter sought an extension
20 of time to oppose Defendants' Motion on February 1, 2011, which the
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24 ⁴ The Memorandum of Points and Authorities indicates that it
25 is in support of "Defendant Morales's Motion for Summary Judgment."
26 (See Mot. Summ. J. Attach. #1 Mem. P. & A. 1, ECF No. 52.) The
27 Court construes this as a typographical error and will consider the
document as supporting Defendant Morris, Panichello, and Perez's
Motion for Summary Judgment. (See Mot. Summ. J. 1, ECF No. 52.)

28 ⁵ The Court will also cite to all documents in support of
Defendants' Motion for Summary Judgment using the page numbers
assigned by the Court's electronic case filing system.

1 Court granted [ECF No. 56-57].⁶ On March 2, 2011, Plaintiff filed
2 a two-page letter titled, "Opposition to the Defendants' Motion for
3 Summary Judgment," in which he stated that he had not received a
4 copy of Defendants' Motion and requested an opportunity to respond
5 [ECF No. 66]. Easter also mailed to the Court a second document
6 titled, "Opposition to the Defendants' Motion for Summary
7 Judgment," which was filed nunc pro tunc to March 7, 2011 [ECF Nos.
8 72, 73]. This three-page document, however, lacks substantive
9 arguments and evidence in opposition.

10 During a telephonic conference on March 9, 2011, Easter
11 informed the Court that despite Defendants' efforts, he still had
12 not received a copy of their Motion for Summary Judgment [ECF No.
13 70]. The Court confirmed Plaintiff's mailing address and
14 instructed defense counsel to forward Easter another copy of the
15 Motion as well as a copy of the Court's Klingele/Rand Notice.
16 (Mins., Mar. 9, 2011, ECF No. 70.) Plaintiff was given another
17 extension of time to respond to the Motion; any opposition was to
18 be filed by March 25, 2011, and any reply was to be filed by April
19 1, 2011. (Id.) That same day, defense counsel filed a Proof of
20 Service indicating that a copy of the Motion for Summary Judgment
21 and related documents, as well as a copy of the Klingele/Rand
22 Notice, were mailed yet again to Plaintiff [ECF No. 71].

23 On March 30, 2011, before Easter's substantive opposition was
24 filed and two days before Defendants' deadline to file a reply,
25 Defendants' Reply to Plaintiff's Opposition to the Motion for
26 Summary Judgment was filed [ECF No. 74]. The Reply responds to the

27
28 ⁶ The corresponding Minute Order, as well as the Klingele/Rand
Notice, were later returned to the clerk of the court as
undeliverable [ECF Nos. 59, 69].

1 three-page Opposition filed nunc pro tunc to March 7, 2011. (See
 2 Reply 1, Mar. 30, 2011, ECF No. 74.) Plaintiff then mailed a third
 3 document titled, "Opposition to Defendants' Motion for Summary
 4 Judgment" with exhibits that was docketed on April 1, 2011, but
 5 filed nunc pro tunc to March 24, 2011 [ECF Nos. 75-76]. This third
 6 "Opposition" is a substantive response to Defendants' Motion and
 7 includes additional evidence in opposition. (See Opp'n 1, 5-23,
 8 Mar. 24, 2011, ECF No. 76.) On April 7, 2011, Defendants' Reply to
 9 Plaintiff's Opposition to the Motion for Summary Judgment was
 10 filed, along with the Declaration of K. Cunningham [ECF No. 77],
 11 which responds to Plaintiff's March 24th Opposition.

12 As explained above, Plaintiff's third Opposition with
 13 exhibits, filed nunc pro tunc to March 24, 2011, is his substantive
 14 response to the Motion for Summary Judgment. (Opp'n 1, 5-11, Mar.
 15 24, 2011, ECF No. 76.) Defendants' Reply filed on April 7, 2011,
 16 responds to this Opposition. (Reply 1-7, Apr. 7, 2011, ECF No.
 17 77.) Therefore, the Court construes these documents as the
 18 Opposition and the Reply, but will also consider any relevant
 19 arguments raised in Plaintiff's second Opposition [ECF No. 73], and
 20 in the Defendants' first Reply [ECF No. 74], that are not also
 21 addressed in the substantive Opposition [ECF No. 76] and Reply [ECF
 22 No. 77], respectively.⁷

23 I. PROCEDURAL BACKGROUND

24 This lawsuit is a renewal of the § 1983 action that Easter
 25 commenced on January 29, 2007. See Easter v. CDC (Easter I), No.
 26 07-cv-00187 L(RBB) (S.D. Cal. filed Jan. 29, 2007), ECF No. 1.

27
 28 ⁷ The Court will also cite to the oppositions using the page numbers assigned by the Court's electronic case filing system.

1 There, Easter maintained that Defendants CDC State of California,
2 Morris, Panichello, Perez, and Hilton violated his Eighth Amendment
3 rights by placing him in the same prison yard where he had
4 previously been assaulted, causing him to be assaulted again. Id.
5 Defendants Perez, Panichello, and Morris filed a motion to dismiss
6 for failing to exhaust administrative remedies. Easter I, No. 07-
7 CV-00187 L(RBB) (motion to dismiss), ECF No. 18.

8 This Court issued a report and recommendation that the claims
9 against defendants Perez, Panichello, and Morris be dismissed
10 without prejudice. Id. (report and recommendation), ECF No. 30.
11 On November 20, 2008, United States District Court Judge James
12 Lorenz adopted in part, and modified in part, the report and
13 recommendation. Id., slip op., ECF No. 32. He granted the
14 defendants' motions and dismissed the complaint without prejudice.
15 Id. at 3. As to exhaustion, Judge Lorenz held that Easter had
16 filed the lawsuit on January 29, 2007, but he did not submit his
17 administrative grievance to prison officials until February 7,
18 2007. Id. at 2 (citation omitted).

19 The district court explained:

20 [T]he court is troubled by the prison authorities'
21 unresponsiveness in processing Plaintiff's grievance
22 after February 7, 2007. The Magistrate Judge found that
23 the prison authorities had not at any level or at any
24 time rejected Plaintiff's grievance as untimely. He
25 therefore found that Plaintiff could still complete the
26 appeal of his grievance, and recommended that the
27 complaint be dismissed without prejudice. As of January
28 19, 2008, Plaintiff's second level appeal had been
pending before the prison authorities at RJ Donovan state
prison for some time, however, when he filed his
objections to the Report and Recommendation on March 17,
2008, he still had not received a response. As of that
time, the prison authorities' twenty working days to
respond to the second level appeal had long passed.

1 Id. (internal citations omitted). Nonetheless, Judge Lorenz
2 dismissed the action without prejudice for failure to exhaust;
3 Easter had not submitted his grievance until after filing the
4 lawsuit. Id. at 1-3. The court therefore concluded that as of the
5 date of its order, November 20, 2008, the grievance process was
6 ongoing. Id.

7 The Complaint in this case, filed on March 18, 2009, is a
8 resumption of the civil rights allegations Easter attempted to
9 litigate in his January 29, 2007 complaint.

10 II. FACTUAL BACKGROUND

11 A. Plaintiff's Complaint

12 Plaintiff is an African-American who was incarcerated at
13 Donovan when the events giving rise to the Complaint occurred.
14 (See Compl. 1, ECF No. 1.) On August 27, 2006, while Easter was
15 housed in yard four of building seventeen in Donovan, he was
16 assaulted by a group of Caucasian prisoners. (See id. at 1, 3.)
17 An incident report was completed that same day, which noted
18 Easter's enemies. (See id. at 3, 5.) He was placed in the
19 administrative segregation unit ("AS") because of his involvement
20 in the fight. (Id. at 3-5; id. Attach. #1, at 11.) Plaintiff was
21 later released from administrative segregation and placed in yard
22 two because he had enemies in yard four. (See Compl. 3-5, ECF No.
23 1; id. Attach. #1, at 11.) Easter was subsequently rehoused with
24 his inmate enemies again in yard four. (Id.) Then, on November
25 14, 2006, Plaintiff was attacked again, stabbed; he ultimately was
26 sent to the hospital with "life threatening injuries." (Compl. 3,
27 ECF No. 1.)

1 Plaintiff contends that Correctional Officer Perez made the
2 decision to move Easter back to yard four even though she knew he
3 had been previously attacked on that yard on August 27, 2006. (Id.
4 at 2.) As a result, Plaintiff was attacked a second time by
5 approximately fifteen "skin heads with knives." (Id.) Lieutenant
6 Panichello knew that Easter had enemies on prison yard four, yet he
7 nonetheless escorted Plaintiff back to the yard even though
8 Plaintiff "told him that [he] wasn't supposed to go back to that
9 yard" and there was other housing available for Easter. (Id. at
10 4.) Finally, Defendant Captain Morris had prior knowledge of
11 Easter's enemy concerns in facility four from incident reports
12 created in response to the August 27, 2006 riot. (Id. at 2.)

13 Easter seeks \$15,000,000 in monetary damages, \$10,000,000 in
14 punitive damages, and an order requiring Defendants to pay the
15 costs Plaintiff incurred litigating this action. (Id.)

16 **B. Facts Not Subject to Dispute**

17 The Defendants have included with their Motion a statement of
18 facts they contend are not in dispute with a citation to supporting
19 evidence. (Mot. Summ. J. Attach. #2 Separate Statement Undisputed
20 Facts 1-7, ECF No. 52.) On August 27, 2006, there was a racial
21 riot in facility four involving African-American and Caucasian
22 inmates. (Id. at 1 (citing id. Attach. #3 App. Evidence Ex. A, at
23 4, Ex. J Decl. Morris 63-64).) A large group of prisoners ignored
24 officials' repeated orders to cease fighting. (Id.) Several
25 inmates who were not already participating in the fight attempted
26 to get involved, but ultimately chose to lie down on the ground
27 when officials used a thirty-seven millimeter gas gun. (Id. at 1-
28 2.) Easter was one of these African-American prisoners who tried

1 to participate in the riot but chose not to. (Id. at 2 (citing id.
2 Attach. #3 App. Evidence Ex. A, at 4, Ex. J Decl. Morris 64, Ex. P,
3 at 91).) It appears that Easter was not assaulted or injured in
4 the riot; the medical report indicates that he had no visible
5 injuries. (Id. (citing id. Attach. #3 App. Evidence Ex. B, at 6,
6 Ex. J Decl. Morris 64).)

7 As a result of his attempt to participate in the riot,
8 Plaintiff was disciplined for engaging in conduct that "may lead to
9 violence." (Id. (citing id. Attach. #3 App. Evidence Ex. J Decl.
10 Morris 64).) Easter was placed in administrative segregation in
11 facility two with numerous inmates who participated in the August
12 27, 2006 riot. (Id. (citing id. Attach. #3 App. Evidence Ex. C, at
13 8, Ex. J Decl. Morris 64.) On September 28, 2006, Easter's Notice
14 of Critical Case Information -- Safety of Persons List ("enemy
15 list") was updated by R. Velo; under the column "nonconfidential
16 enemies," "none noted" was written. (Id. (citing id. Attach. #3
17 App. Evidence Ex. D, at 10, Ex. J Decl. Morris 64).)

18 Defendants state that prison officials learn of threats to a
19 particular inmate's safety is when the inmate to communicates the
20 threat to the staff. (Id.) The prisoner must identify the
21 specific individual enemy and describe why he believes the
22 individual poses a threat; officials then document the enemy in a
23 CDC Form 128B chrono. (Id.) Inmates are not permitted to place an
24 entire ethnicity or race on an enemy list because prison officials
25 believe it would be impracticable to segregate by ethnicity. (Id.
26 at 2-3.) Prison authorities may also learn of threats to a
27 prisoner's safety when the official learns that the inmate is
28 involved in mutual combat or another incident with an identifiable

1 prisoner. (Id. at 3.) Because Plaintiff did not participate in
2 the August 27, 2006 riot, unless he directly communicated to prison
3 officials that a certain inmate posed a threat to his safety, the
4 Defendants would not add any enemies to Plaintiff's enemy list.
5 (Id.) Easter never told prison officials that a particular person
6 posed a threat to his safety. (Id. (citing id. Attach. #3 App.
7 Evidence Ex. J. Decl. Morris 64-65).)

8 When a prisoner is housed in administrative segregation, the
9 Institutional Classification Committee ("ICC") meets with the
10 inmate and reviews his central file to determine whether he should
11 be transferred back to the general prison population. (Id. (citing
12 id. Attach. #3 App. Evidence Ex. J Decl. Morris 65, Ex. K Decl.
13 Panichello 70).) According to Captain Morris, on September 29,
14 2006, the committee met with Easter and concluded that he was no
15 longer a threat to prison security, and the committee noted that
16 Plaintiff did not have any safety concerns. (Id.) If Easter
17 expressed any concerns at this time, ICC would have addressed them.
18 (Id. (citing id. Attach. #3 App. Evidence Ex. E, at 12, Ex. J.
19 Decl. Morris 65).) Plaintiff was released from facility two to the
20 reception center in facility four. (Id. (citing id. Attach. #3
21 App. Evidence Ex. F, at 14-16, Ex. J Decl. Morris 65); see also,
22 id. Ex. L Decl. Perez 73.)

23 Defendant Perez is a Correctional Officer in Housing
24 Assignments, and her duty is to find cell placements for prisoners
25 housed in facility four. (Mot. Summ. J. Attach. #2 Separate
26 Statement Undisputed Facts 3, ECF No. 52.) The classification
27 committee takes all considerations into account when selecting
28 housing assignments for inmates, including the location of any

1 enemies. (Id.) Perez relies entirely on the committee's
2 determinations regarding cell placements whenever a prisoner is
3 removed from administrative segregation. (Id. at 3-4 (citing id.
4 Attach. #3 App. Evidence Ex. L Decl. Perez 73).) Perez's office is
5 not located on facility two or facility four, and she does not
6 speak with the prisoners. (Id.) At no time did Easter inform
7 Perez that he was hesitant about being housed in facility four.
8 (Id.) According to Perez, she was not notified of any potential
9 enemies in facility four that posed a threat to Easter's safety or
10 of any reason why he should not be placed there. (Id. at 4 (citing
11 id. Attach. #3 App. Evidence Ex. L Decl. Perez 73).) Easter
12 concedes that he has not had any conversations with Officer Perez
13 in more than ten years and had no written communication with her
14 after the August riot. (Id. (citing id. Attach. #3 App. Evidence
15 Ex. P, at 98-99, 101).)

16 Defendant Panichello states that he does not remember Easter
17 expressing any concern that being transferred back to facility four
18 posed a risk to Plaintiff's safety; had he done so, Panichello
19 would have investigated Plaintiff's claims and taken appropriate
20 action. (Id. (citing id. Attach. #3 App. Evidence Ex. K Decl.
21 Panichello 70).)

22 After Easter was transferred to facility four, he informally
23 asked Defendant Morris to transfer him back to facility two. (Id.
24 (citing id. Attach. #3 App. Evidence Ex. J Decl. Morris 65-66).)
25 Morris specifically asked Easter if remaining in facility four
26 posed a threat to his safety, and Plaintiff denied having enemy
27 concerns. (Id.) Captain Morris does not recall Easter giving any
28 reason for his request to be transferred back to facility two,

1 therefore, there was no basis for Morris to conclude that
2 Plaintiff's safety would be in jeopardy in facility four. Id.

3 During his deposition, Plaintiff testified that he did not
4 communicate with Defendant Morris regarding threats to his safety
5 prior to the November 14, 2006 prison riot. (Id. at 4-5.) Easter
6 stated, "'I never talked to Captain Morris after the—[sic] I only
7 talked to Captain Morris after the second incident. Never before
8 the first one. Or after the first one.'" (Id. at 5 (quoting id.
9 Attach. #3 App. Evidence Ex. P, at 93-95).) Plaintiff subsequently
10 altered his statement by testifying that the did express his safety
11 concerns to Morris before the second riot. (Id. (citing id.
12 Attach. #3 App. Evidence Ex. P, at 96-97).) Easter also testified
13 that he did not give Defendants the names of potential enemies in
14 facility four because he did not know the specific identity of
15 potential enemies in that yard. (Id. (citing id. Attach. #3 App.
16 Evidence Ex. P, at 100).)

17 On November 14, 2006, another riot between African-American
18 and Caucasian inmates occurred in facility four, causing Plaintiff
19 and numerous other prisoners serious injuries. (Id. (citing id.
20 Attach. #3 App. Evidence Ex. G, at 18-43, Ex. J Decl. Morris 66).)
21 Prisoner Hill, CDC V-35354, was identified as the individual who
22 stabbed Easter during this fight. (Id.) Hill was added to
23 Plaintiff's enemy list on November 14, 2006, and again on April 16,
24 2007. (Id. (citing id. Attach. #3 App. Evidence Ex. H, at 45, Ex.
25 J Decl. Morris 66).) Inmate Hill did not, however, participate in
26 the August 27, 2006 riot, and there is no suggestion that he was
27 ever a threat to Easter's safety prior to the November 14, 2006
28 riot. (Id.) According to Captain Morris, unless Plaintiff

specifically communicated to prison officials that Hill was an enemy, it would have been impossible for staff to know that he posed a threat to Easter. (Id. (citing id. Attach. #3 App. Evidence Ex. G, at 18-43, Ex. I, at 47-61, Ex. J Decl. Morris 66).) During his deposition, Plaintiff admitted that Hill was not on his enemy list when the November 14, 2006 riot occurred, and he was unsure whether Hill was also involved in the August 27, 2006 riot. (Id. at 5-6 (citing id. Attach. #3 App. Evidence Ex. J Decl. Morris 65-67, Ex. K Decl. Panichello 70, Ex. L Decl. Perez 73-74).)

III. LEGAL STANDARD FOR SUMMARY JUDGMENT MOTIONS

Federal Rule of Civil Procedure 56(c) provides, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Like the standard for a directed verdict, judgment must be entered for the moving party "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (citing Brady v. S. Ry. Co., 320 U.S. 476, 479-80 (1943)). "If reasonable minds could differ," judgment should not be entered in favor of the moving party. Id. at 250-51; see also Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007).

The parties bear the same substantive burden of proof that would apply at a trial on the merits, including plaintiff's burden to establish any element essential to his case. Liberty Lobby, Inc., 477 U.S. at 252; Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805-06 (1999); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Liberty Lobby, Inc., 477 U.S. at 252; see also Taylor

1 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). "When the nonmoving
2 party bears the burden of proof at trial, summary judgment is
3 warranted if the nonmovant fails to 'make a showing sufficient to
4 establish the existence of an element essential to [its] case.'" Nebraska v. Wyoming, 507 U.S. 584, 590 (1993) (quoting Celotex
5 Corp., 477 U.S. at 322). The absence of a genuine issue of
6 material fact on a single element of a claim is sufficient to
7 warrant summary judgment on that claim. Celotex Corp., 477 U.S. at
8 322-23.

10 The moving party bears the initial burden of identifying the
11 pleadings and evidence it "believes demonstrate the absence of a
12 genuine issue of material fact." Id. at 323; Adickes v. S.H. Kress
13 & Co., 398 U.S. 144, 157 (1970); Martinez v. Stanford, 323 F.3d
14 1178, 1182-83 (9th Cir. 2003). The burden then shifts to the
15 nonmoving party to establish, beyond the pleadings, that there is a
16 genuine issue for trial. Celotex Corp., 477 U.S. at 324. To
17 successfully rebut a defendant's properly supported motion for
18 summary judgment, the plaintiff "must point to some facts in the
19 record that demonstrate a genuine issue of material fact and, with
20 all reasonable inferences made in the plaintiff[']s[] favor, could
21 convince a reasonable jury to find for the plaintiff[]." Reese v.
22 Jefferson School Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000)
23 (citing Fed. R. Civ. P. 56; Celotex Corp., 477 U.S. at 323; Liberty
24 Lobby, 477 U.S. at 249). Material issues are those that "might
25 affect the outcome of the suit under the governing law." Liberty
26 Lobby, 477 U.S. at 248; see also Chevron USA, Inc. v. Cayetano, 224
27 F.3d 1030, 1039-40 (9th Cir. 2000); SEC v. Seaboard Corp., 677 F.2d
28 1301, 1305-06 (9th Cir. 1982). More than a "metaphysical doubt" is

1 required to establish a genuine issue of material fact. Matsushita
2 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

3 In deciding whether any genuine issue of material fact remains
4 for trial, courts must "view[] the evidence in the light most
5 favorable to the nonmoving party" Fontana v. Haskin, 262
6 F.3d 871, 876 (9th Cir. 2001); see also Eastman Kodak Co. v. Image
7 Technical Serv., Inc., 504 U.S. 451, 456 (1992) (stating that the
8 nonmoving party's evidence is to be believed and all reasonable
9 inferences drawn in the nonmoving party's favor). "When opposing
10 parties tell two different stories, one of which is blatantly
11 contradicted by the record, so that no reasonable jury could
12 believe it, a court should not adopt that version of the facts for
13 purposes of ruling on a motion for summary judgment." Scott v.
14 Harris, 550 U.S. 372, 380 (2007). While the district court is not
15 required to search the entire record for an issue of fact, the
16 court may nevertheless exercise its discretion to consider
17 materials in the record that are not specifically referred to.
18 Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031
19 (9th Cir. 2001); Forsberg v. Pacific N.W. Bell Tel. Co., 840 F.2d
20 1409, 1417-18 (9th Cir. 1988).

21 When the nonmoving party is proceeding pro se, the court has a
22 duty to consider "all of [the nonmovant's] contentions offered in
23 motions and pleadings, where such contentions are based on personal
24 knowledge and set forth facts that would be admissible in evidence,
25 and where [the nonmovant] attested under penalty of perjury that
26 the contents of the motions or pleadings are true and correct."
27 Jones v. Blanas, 393 F.3d 918, 922-23 (9th Cir. 2004) (citations
28 omitted).

1 **IV. EXHAUSTION**

2 The Defendants move for summary judgment under Federal Rule of
3 Civil Procedure 56 for nonexhaustion as well as on the merits.
4 Perez, Panichello, and Morris argue that Easter failed to exhaust
5 his nonjudicial remedies before filing this lawsuit, as required by
6 the Prison Litigation Reform Act, because he did not appeal his
7 inmate grievance through the third level of review. (Mot. Summ. J.
8 2, ECF No. 52; id. Attach. #1 Mem. P. & A. 5.)

9 **A. The Rule of Exhaustion**

10 Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act
11 ("PLRA") states: "No action shall be brought with respect to
12 prison conditions under [42 U.S.C. § 1983] or any other Federal
13 law, by a prisoner confined in any jail, prison, or other
14 correctional facility until such administrative remedies as are
15 available are exhausted." 42 U.S.C.A. § 1997e(a) (West 2003). The
16 exhaustion requirement applies regardless of the relief sought.
17 Booth v. Churner, 532 U.S. 731, 741 (2001) (citation omitted).

18 "[A]n action is "brought" for purposes of § 1997e(a) when the
19 complaint is tendered to the district clerk[]"" Vaden v.
20 Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006) (quoting Ford v.
21 Johnson, 362 F.3d 395, 400 (7th Cir. 2004)). Therefore, prisoners
22 must "exhaust administrative remedies before submitting any papers
23 to the federal courts." Id. at 1048 (emphasis added).

24 Section 1997e(a)'s exhaustion requirement creates an
25 affirmative defense. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th
26 Cir. 2003). "[D]efendants have the burden of raising and proving
27 the absence of exhaustion." Id. (footnote omitted). Defendants in
28 § 1983 actions properly raise the affirmative defense of failure to

1 exhaust administrative remedies through an unenumerated motion to
2 dismiss under Rule 12(b). Id. (citations omitted).

3 Unlike motions to dismiss for failure to state a claim for
4 which relief may be granted, "[i]n deciding a motion to dismiss for
5 failure to exhaust nonjudicial remedies, the court may look beyond
6 the pleadings and decide disputed issues of fact." Id. at 1119-20
7 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837
8 F.2d 365, 369 (9th Cir. 1988)) (footnote omitted). Courts have
9 discretion regarding the method they use to resolve these factual
10 disputes. Ritza, 837 F.2d at 369 (citations omitted). "A court
11 ruling on a motion to dismiss also may take judicial notice of
12 'matters of public record.'" Hazleton v. Alameida, 358 F. Supp. 2d
13 926, 928 (C.D. Cal. 2005) (citing Lee v. City of Los Angeles, 250
14 F.3d 668, 688 (9th Cir. 2001) (citations omitted)). But "if the
15 district court looks beyond the pleadings to a factual record in
16 deciding the motion to dismiss for failure to exhaust[,]. . . the
17 court must assure that [the plaintiff] has fair notice of his
18 opportunity to develop a record." Wyatt, 315 F.3d at 1120 n.14.

19 If the district court concludes that the prisoner has not
20 exhausted nonjudicial remedies, the proper remedy is dismissal of
21 the claim without prejudice." Id. at 1120 (citing Ritza, 837 F.2d
22 at 368 n.3).

23 **B. The California Administrative Grievance Process**

24 "The California Department of Corrections ['CDC'] provides a
25 four-step grievance process for prisoners who seek review of an
26 administrative decision or perceived mistreatment: an informal
27 level, a first formal level, a second formal level, and the
28 Director's level." Vaden, 449 F.3d at 1048-49 (citing Brown v.

1 Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005)). The administrative
 2 appeal system can be found in title 15, sections 3084.1, 3084.5,
 3 and 3084.6 of the California Code of Regulations ("CCR").⁸ See
 4 Brown, 422 F.3d at 929-30 (citing Cal. Code Regs. tit. 15, §§
 5 3084.1(a), 3084.5(a)-(b), (e)(1)-(2), 3084.6(c) (amended 2011)).

6 To comply with the CDC's administrative grievance procedure,
 7 an inmate must file his grievance at the informal level within
 8 fifteen working days of the event being appealed. Cal. Code Regs.
 9 tit. 15, § 3084.6(c) (2009); see also Brown, 422 F.3d at 929. An
 10 inmate must proceed through all levels of the administrative
 11 grievance process before initiating a § 1983 suit in federal court.
 12 See Vaden, 449 F.3d at 1051.

13 A prisoner's grievances must be "sufficient under the
 14 circumstances to put the prison on notice of the potential claims
 15 and to fulfill the basic purposes of the exhaustion requirement."
 16 Irvin v. Zamora, 161 F. Supp. 2d 1125, 1135 (S.D. Cal. 2001).
 17 Exhaustion serves several important goals, including "allowing a
 18 prison to address complaints about the program it administers
 19 before being subjected to suit, reducing litigation to the extent
 20 complaints are satisfactorily resolved, and improving litigation
 21 that does occur by leading to the preparation of a useful record."
 22 Jones v. Bock, 549 U.S. 199, 219 (2007) (citing Woodford v. Ngo,
 23 548 U.S. 81, 88-91 (2006); Porter v. Nussle, 534 U.S. 516, 524

24
 25 ⁸ The regulations governing the prison administrative
 26 grievance process were amended on December 17, 2010, effective
 27 January 28, 2011. See Cal. Code Regs. tit. 15, §§ 3084 - 3084.8
 28 (amended 2011). Because Easter filed the Complaint on March 18,
 2009, the Court will use the regulations in effect at that time.
 (See Compl. 1, ECF No. 1); Cal. Code Regs. tit. 15, §§ 3084 -
 3084.8 (2009) (current version at Cal. Code Regs. tit. 15, §§ 3084
 - 3084.8 (2011)); see also Shepard v. Cohen, No. 1:09-cv-01628,
 2011 U.S. Dist. LEXIS 6838, at *4 n.1 (E.D. Cal. Jan. 25, 2011).

1 (2002)).

2 **C. Dismissal Versus Summary Judgment**

3 The Defendants raise the affirmative defense of nonexhaustion
4 as part of their Motion and argue that summary judgment should be
5 granted. (Mot. Summ. J. 2, ECF No. 52; id. Attach. #1 Mem. P. & A.
6 10-12.) "[P]laintiff failed to exhaust administrative remedies,
7 this failure alone is grounds for the Court to grant this motion in
8 its entirety." (Mot. Summ. J. 2, ECF No. 52.)

9 The Ninth Circuit has held that the proper pretrial vehicle
10 for challenging a prisoner's failure to comply with the exhaustion
11 requirement is to file an unenumerated motion to dismiss under
12 Federal Rule of Civil Procedure 12(b), rather than a motion for
13 summary judgment. Wyatt, 315 F.3d at 1119 (citing Ritza, 837 F.2d
14 at 368); see Janis v. Ashcroft, 94 F. App'x 564, 566-67 (9th Cir.
15 2004); Cox v. Harris, 60 F. App'x 685, 686 (9th Cir. 2003). The
16 general rule is that the "failure to exhaust nonjudicial remedies
17 is a matter in abatement, not going to the merits of the claim, and
18 as such is not properly raised in a motion for summary judgment."
19 Ritza, 837 F.2d at 368; see Stauffer Chem. Co. v. FDA, 670 F.2d
20 106, 108 (9th Cir. 1982). "The appropriate procedure for raising
21 the failure-to-exhaust defense under 42 U.S.C. § 1997e(a),
22 therefore, is by a Rule 12(b) motion to dismiss." Janis, 94 F.
23 App'x at 566-67 (citing Wyatt, 315 F.3d at 1119).

24 When a failure to exhaust defense is included in a motion for
25 summary judgment, courts should treat it as if it were raised in a
26 motion to dismiss. Ritza, 837 F.2d at 368-69 ("[Exhaustion] should
27 be raised in a motion to dismiss, or be treated as such if raised
28 in a motion for summary judgment."); see Stauffer Chem. Co., 670

1 F.2d at 108 (finding that the motion for summary judgment for
 2 failure to exhaust should have been treated as a motion to
 3 dismiss); Studio Elec. Technicians Local 728 v. Int'l Photographers
 4 of the Motion Picture Indus. Local 659, 598 F.2d 551, 552 (9th Cir.
 5 1979) (explaining that courts should treat these matters as a
 6 motion to dismiss even if they are brought by summary judgment).

7 Accordingly, this Court construes Defendants' Motion for
 8 Summary Judgment because of Easter's failure to exhaust as a
 9 nonenumerated motion to dismiss under Federal Rule of Civil
 10 Procedure 12(b). See Davitt v. Centric, No. 3:06-cv-00502-
 11 HDM(RAM), 2010 U.S. Dist. LEXIS 73430, at *9-10 (D. Nev. May 25,
 12 2010) (recommending that plaintiff's claims be dismissed without
 13 prejudice for failure to exhaust after treating motion for summary
 14 judgment as motion to dismiss); Boren v. Bocca, No. 3:08-CV-00174-
 15 LRH-VPC, 2009 U.S. Dist. LEXIS 124937, at *22-23 (D. Nev. Nov. 13,
 16 2009) (treating summary judgment motion as a Rule 12(b) motion).

17 **1. Plaintiff's Failure to Exhaust**

18 In both their Answer and their current Motion, Perez,
 19 Panichello, and Morris assert Easter has not properly exhausted his
 20 administrative remedies. (Answer 4, ECF No. 32; Mot. Summ. J.
 21 Attach. #1 Mem. P. & A. 10, ECF No. 52); see Fed. R. Civ. P.
 22 12(h)(2)(A) (providing that if the defense of failure to state a
 23 claim is omitted from the initial motion to dismiss, it may be
 24 raised in the answer); Fed. R. Civ. P. 7(a); see also Panaro v.
 25 City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005) (stating
 26 that the affirmative defense of failure to exhaust is waived if the
 27 defendant does not raise it); Lira v. Herrera, 427 F.3d 1164, 1171
 28 (9th Cir. 2005) (same). Although Defendants failed to raise

1 exhaustion in their initial Motion to Dismiss filed on August 14,
 2 2009, they subsequently plead it in their Answer. (See Mot.
 3 Dismiss Pl.'s Compl. Attach. #1 Mem. P. & A. 3-8, ECF No. 15;
 4 Answer 4, ECF No. 32.) The defense is therefore not waived, and
 5 the Court will consider it when ruling on this Motion. See Fed. R.
 6 Civ. P. 12(h)(2)(A); see also Fed. R. Civ. P. 7(a).

7 To support their assertion that Plaintiff failed to exhaust
 8 his nonjudicial remedies, Defendants include in their Motion a
 9 statement of facts that they contend are not in dispute.⁹ (Mot.
 10 Summ. J. Attach. #2 Separate Statement Undisputed Facts 6, ECF No.
 11 52.) Defendants state that in Appeal No. RJD-08-00385, Easter
 12 alleged that on several occasions he submitted Appeal No. RJD-07-
 13 0491, the grievance in which he argued that Defendants' decision to
 14 place him in facility four caused him to be assaulted a second
 15 time. (Id. (citing id. Attach. #3 App. Evidence Ex. M, at 77).)
 16 In the 08-00385 grievance, Plaintiff complains that the Appeals
 17 Coordinator failed to properly process his 07-0491 grievance
 18 challenging the Defendants' decision to rehouse him in yard four.
 19 (Id. (citing id. Attach. #3 App. Evidence Ex. M, at 78, Ex. N, at
 20 80-81).) The Defendants argue:

21 Regarding Appeal Log No. RJD-08-00385, D. Foston
 22 determined that Plaintiff received a First Level response
 23 to Log No. RJD-07-0491 on April 27, 2007, but that he did
 24 not appeal the decision to the Second Level until August
 25 15, 2007, which was untimely. Accordingly, Appeal Log
 26 No. RJD-07-0491 was returned to plaintiff on August 16,
 27 2007, and screened out, as Plaintiff exceeded the

28 ⁹ Because the Court construes Defendants' Motion as a motion
 to dismiss with regard to exhaustion, it will consider the events
 relating to Easter's appeal that Defendants outline in their
 statement of undisputed facts. See Wyatt, 315 F.3d at 1119-20
 (allowing courts to look beyond the pleadings when resolving
 exhaustion issues).

1 prescribed time constraints for requesting Second Level
2 review.

3 (Id. (citing id. Attach. #3 App. Evidence Ex. M, at 78, Ex. N, at
4 80-81).)

5 Defendants maintain that inmates who do not complete every
6 step of the prison's grievance process are barred from bringing a
7 civil rights action. (Mot. Summ. J. Attach. #1 Mem. P. & A. 11,
8 ECF No. 52.) They submit that Plaintiff never appealed the
9 grievance containing the deliberate indifference allegations to the
10 third level of review or received a decision from the director.

11 (Id. at 12; id. Attach. #2 Separate Statement Undisputed Facts 7
12 (citing id. Attach. #3 App. Evidence Ex. M, at 79).) Therefore,
13 Defendants explain, Easter failed to exhaust his administrative
14 remedies. (Mot. Summ. J. Attach. #1 Mem. P. & A. 12, ECF No. 52.)

15 In response, Plaintiff contends that he has complied with the
16 exhaustion requirements. (Opp'n 5, Mar. 24, 2011, ECF No. 76.) He
17 refers to his initial civil rights complaint that was filed in
18 January 2007 and ultimately dismissed without prejudice for failure
19 to exhaust because the grievance process was still ongoing. (Id.);
20 see also Easter I, No. 07-cv-00187 L(RBB) (slip op.), ECF No. 32.
21 Easter explains, "[I]t is on file that I was able to come back to
22 court once I finish exhausting my remedies [sic]." (Opp'n 5, Mar.
23 24, 2011, ECF No. 76.) He states that he was then able to refile
24 this civil rights action in March 2009. (Id.)

25 Plaintiff argues that the level three appeals tracking form
26 that was filed as an attachment to Defendants' Motion for Summary
27 Judgment establishes that Easter's appeal was denied at the third
28 level. (Id. (citing id. Ex. F, at 21); see Mot. Summ. J. Attach.

1 #3 App. Evidence Ex. Q, at 104.) Plaintiff concedes, however, that
2 the tracking sheet only identifies the 08-00385 grievance, but he
3 insists that prison officials never returned his 07-0491 grievance
4 to him. (Opp'n 11, Mar. 24, 2011, ECF No. 76.) The 07-0491
5 grievance was pending when Easter filed his first complaint; it
6 dealt with Defendants' decision to reassign him to facility four.
7 (Id.) Plaintiff alleges he informed the court in the previous
8 lawsuit that prison officials were "playing games" with the
9 processing of grievance 07-0491; Easter argues that the court
10 ultimately agreed with him. (Id.) Plaintiff explains that his
11 prior lawsuit was dismissed without prejudice until he was able to
12 finish exhausting the 07-0491 appeal. (Id.)

13 In their Reply, Defendants counter that Plaintiff's "rambling
14 explanation as to how he allegedly exhausted administrative
15 remedies" does not rebut their evidence of nonexhaustion. (Reply
16 2, Apr. 7, 2011, ECF No. 77.) They point out that Easter never
17 addresses the fact that the appeal relating to this incident,
18 Appeal Log No. RJD-07-0491, was screened out at the second level as
19 untimely. (Id. at 2-3.) Defendants assert that the evidence
20 Plaintiff attaches to his Opposition – a copy of his third level
21 appeals history – actually confirms that the 07-0491 appeal was
22 never exhausted. (Id. at 3.)

23 "Exhaustion of administrative remedies serves two main
24 purposes." Woodford, 548 U.S. at 89 (quoting McCarthy v. Madigan,
25 503 U.S. 140, 145 (1992)). "First, exhaustion protects
26 'administrative agency authority'" by giving an agency "'an
27 opportunity to correct its own mistakes . . . before it is hauled
28 into federal court'" and by discouraging "'disregard of [the

1 agency's] procedures.'" Id. (quoting McCarthy, 503 U.S. at 145).
 2 "Second, exhaustion promotes efficiency [and] 'may produce
 3 a useful record for subsequent judicial consideration.'" Id.
 4 (quoting McCarthy, 503 U.S. at 145). These two purposes are best
 5 served when civil rights plaintiffs are forced to properly exhaust
 6 administrative remedies and comply with the deadlines set by the
 7 administrative agency. Id. at 95-96. Therefore, § 1997e(a)'s
 8 exhaustion requirement has not been satisfied if the plaintiff
 9 filed an administrative grievance that was rejected at the second
 10 level of review as untimely. Id.

11 The defendant bears the initial burden of proof, in part,
 12 because "'it is considerably easier for a prison administrator to
 13 show a failure to exhaust than it is for a prisoner to demonstrate
 14 exhaustion.'" Wyatt, 315 F.3d at 1119 (quoting Ray v. Kertes, 285
 15 F.3d 287, 295 (3d Cir. 2002)). If the defendant has pled and
 16 proved a failure to exhaust, the burden shifts to the plaintiff to
 17 present evidence that he did exhaust administrative remedies. Ming
 18 Ching Jin v. Hense, No. 1:03-CV-5282-REC-SMS-P, 2005 U.S. Dist.
 19 LEXIS 28083, at *6 (E.D. Cal. Nov. 15, 2005).

20 **a. Consideration of public records**

21 Courts may consider "matters of public record" when ruling on
 22 a motion to dismiss, which includes pleadings, orders, and other
 23 papers that are filed with a court. Coto Settlement v. Eisenberg,
 24 593 F.3d 1031, 1038 (9th Cir. 2010); Lee v. City of Los Angeles,
 25 250 F.3d 668, 688-89 (9th Cir. 2001); Mack v. South Bay Beer
 26 Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); see Thomas v.
 27 Walt Disney Co., 337 F. App'x 694, 695 (9th Cir. 2009). But courts
 28 may not take judicial notice of disputed facts stated in those

1 public records. Brown, 422 F.3d at 931 n.7 (quoting City of
2 Sausalito v. O'Neill, 386 F.3d 1186, 1224 n.2 (9th Cir. 2004));
3 Lee, 250 F.3d at 689-90; Hunt v. Rodriguez, No. CIV S-06-0141 MCE
4 GGH P, 2009 U.S. Dist. LEXIS 8184, at *8-9 (E.D. Cal. Jan. 23,
5 2009).

6 As discussed above, Easter previously sought relief for these
7 Defendants' purported deliberate indifference in a separate § 1983
8 action that was also before this Court. See Easter I, No. 07-cv-
9 00187 L(RBB) (complaint), ECF No. 1. At issue in that lawsuit,
10 among other things, was whether Easter exhausted Appeal Log No. 07-
11 0491, the grievance that challenged Defendants' decision to rehouse
12 him in yard four. See id., (motion to dismiss), ECF No. 25,
13 (report and recommendation), ECF No. 30; id., slip op., ECF No. 32.
14 This Court explicitly reconstructed the chronology of events
15 relating to the submission and processing of this particular
16 grievance. Id., (report and recommendation), ECF No. 30. The
17 recommendation was adopted by the district court judge. Id., slip
18 op., ECF No. 32. Because Easter had filed the lawsuit on January
19 29, 2007, which was before he submitted the grievance at the first
20 level on February 7, 2007, the court found that Easter could still
21 complete the grievance process and therefore dismissed the
22 complaint without prejudice. Id. at 2.

23 Previous court orders discussing the exhaustion of Easter's
24 grievance may be considered when ruling on this Motion because the
25 Complaint refers to the grievance, and the authenticity of court
26 orders is not questioned. See Stone v. Writer's Guild of Am. W.,
27 Inc., 101 F.3d 1312, 1313-14 (9th Cir. 1996). In his Complaint,
28 Plaintiff alleges he exhausted his administrative remedies as to

1 his Eighth Amendment claim. (Compl. 6, ECF No. 1.) He
2 specifically argues, "I followed the administrative remedies --
3 completing up to step 3. No relief obtained, the reason for this
4 filing." (Id.) To support this contention, Plaintiff attaches to
5 the Complaint the prison's response to the grievance relevant to
6 the Court's inquiry - Appeal No. RJD-07-0491 - in which Easter
7 accuses the Defendants of failing to protect him from a substantial
8 risk of harm. (See id. Attach. #1, at 11-12.) Although the first
9 level appeal response to this grievance was issued by authorities
10 at Donovan, the form also bears a stamp dated may 25, 2007, from
11 the Ironwood State Prison ("ISP") appeals office. (Id.) Plaintiff
12 additionally attaches to the Complaint copies of the grievance he
13 subsequently filed and appealed through the third level - Appeal
14 No. RJD-08035 - challenging prison officials' failure to process
15 his earlier 07-0491 grievance. (Id. at 2-10.) Therefore, this
16 Court will consider previous court orders addressing the processing
17 of Easter's 07-0491 appeal as referred to in the Complaint. (See
18 Easter I, No. 07-cv-00187 L(RBB) (report and recommendation), ECF
19 No. 30; id., slip op., ECF No. 32; see also In re Stac Elecs. Secs.
20 Litig., 89 F.3d at 1405 n.4; Fecht, 70 F.3d at 1080 n.1; Cortec
21 Industries, Inc., 949 F.2d at 47-48.

22 Moreover, court orders relating to Easter's initial lawsuit
23 may also be considered to the extent they are matters of public
24 record and contain facts that are not in dispute. See Brown, 422
25 F.3d at 931 n.7; Lee, 250 F.3d at 689-90; see also Fed. R. Evid.
26 201(c) ("A court may take judicial notice, whether requested or
27 not."). In his Opposition to the Motion for Summary Judgment,
28 Plaintiff asserts that the Court has already addressed whether his

1 07-0491 grievance has been exhausted. (See Opp'n 5, 11, Mar. 24,
2 2011, ECF No. 76); see also Easter I, No. 07-cv-00187 L(RBB)
3 (report and recommendation), ECF No. 30; id., slip op., ECF No. 32.
4 Plaintiff argues that in his previous lawsuit, he informed the
5 court that prison officials were thwarting the processing of his
6 grievance, and the court agreed. (Opp'n 11, Mar. 24, 2011, ECF No.
7 76); see also Easter I, No. 07-cv-00187 L(RBB) (report and
8 recommendation), ECF No. 30; id., slip op., ECF No. 32. He
9 reiterates that the initial action was dismissed without prejudice
10 until he could finish exhausting the 07-0491 inmate appeal. (Opp'n
11 5, 11, Mar. 24, 2011, ECF No. 76); see also Easter I, No. 07-cv-
12 00187 L(RBB) (slip op.), ECF No. 32. Plaintiff contends he has
13 still not received a response from the prison regarding his 07-0491
14 grievance. (Opp'n 11, Mar. 24, 2011, ECF No. 76.)

15 Defendants Perez, Panichello, and Morris were defendants in
16 Easter I. See Easter I, No. 07-cv-00187 L(RBB) (complaint), ECF
17 No. 1. Although they had the opportunity to do so in their Reply,
18 Defendants do not dispute the chronology of events relating to
19 Plaintiff's grievance previously discussed by the court. (See
20 Reply 2-3, Apr. 7, 2011, ECF No. 77; see also Opp'n 5, 11, Mar. 24,
21 2011, ECF No. 76.) Nor do the Defendants dispute the facts stated
22 in the prior court opinions. (See Reply 2-3, Apr. 7, 2011, ECF No.
23 77); see also Easter I, No. 07-cv-00187 L(RBB) (report and
24 recommendation), ECF No. 30; id., slip op., ECF No. 32. In fact,
25 Defendants do not even acknowledge Plaintiff's contention that the
26 court has already dealt with the exhaustion issue. (See Reply 2-3,
27 Apr. 7, 2011, ECF No. 77; see also Opp'n 5, 11, Mar. 24, 2011, ECF
28 No. 76.)

1 In Easter I, this Court concluded that the motion to dismiss
2 for failure to exhaust should be dismissed without prejudice
3 because the defendants "failed to meet their burden of showing that
4 [Easter] can no longer properly exhaust his administrative
5 remedies." Easter I, No. 07-cv-00187 L(RBB) (report and
6 recommendation at 15, ECF No. 30). Defendants Perez, Panichello,
7 and Morris "produced no evidence that Plaintiff's appeal [grievance
8 RJD-07-0491] was rejected as untimely, which would end his right to
9 appeal further." Id. The district court agreed with this
10 assessment. Id., slip op. at 2, ECF No. 32. Judge Lorenz
11 continued, "As of January 19, 2008, Plaintiff's second level appeal
12 had been pending before the prison authorities at RJ Donovan state
13 prison for some time, however, when he filed his objections to the
14 Report and Recommendation on March 17, 2008, he still had not
15 received a response." Id.

16 Defendants again contend that Easter has failed to exhaust his
17 Eighth Amendment claim. (Mot. Summ. J. Attach. #1 Mem. P. & A. 5,
18 8, ECF No. 52.) They maintain that Plaintiff received a first
19 level response to grievance RJD-7-0491 on April 27, 2007, but did
20 not appeal the decision to the second level of review until August
21 15, 2007. (Id. at 8.) This time, Defendants assert that Easter's
22 grievance was returned to him on August 16, 2007, and screened out
23 as untimely. (Id.)

24 The Court considered Plaintiff's failure to exhaust in Easter
25 I. The Defendants are not collaterally estopped from relitigating
26 whether Easter exhausted his administrative remedies. "[A] prior
27 judgment does not have preclusive effect unless it is a decision on
28 the merits." Farmer v. McDaniel, 98 F.3d 1548, 1562 (9th Cir.

1 1996) (Schroeder, J., concurring in part and dissenting in part).
2 In Wyatt v. Terhune, 315 F.3d at 1119, the court noted that
3 dismissing a complaint for failure to exhaust administrative
4 remedies is not a judgment on the merits. Consequently, collateral
5 estoppel does not apply.

6 Because the court opinions relating to Easter's previous §
7 1983 complaint against these three Defendants are matters of public
8 record and recite evidence that is not disputed by the parties,
9 this Court will consider the opinions. See Coto Settlement, 593
10 F.3d at 1038; Lee, 250 F.3d at 689-90; Ostrander v. HSBC Bank
11 United States, N.A., No. CIV S-09-1255 JAM EFB PS, 2010 U.S. Dist.
12 LEXIS 2747, at *2-3, n. 2 (E.D. Cal. Jan. 13, 2010) (taking
13 judicial notice of virtually identical complaints that were filed
14 in different court cases); Khangura v. Am. Mortg. Express, No.
15 2:09-cv-0720 LKK JFM PS, 2009 U.S. Dist. LEXIS 47391, at *4 (E.D.
16 Cal. June 5, 2009); see also Fed. R. Evid. 201(c).

17 **b. Discussion**

18 Plaintiff's 07-0491 grievance, dated November 29, 2006, was
19 accompanied by an addendum. (Mot. Summ. J. Attach. #3 App.
20 Evidence Ex. N, at 81-83.) There, Easter stated that on August 27,
21 2006, he was attacked by a group of skin heads; prison officials
22 then rehoused Plaintiff in the same yard as the skin heads, causing
23 him to be attacked a second time by the same gang. (Id. at 81,
24 83.)

25 The grievance was stamped as received by the Donovan appeal
26 office approximately two months later, on February 7, 2007, and was
27 assigned to Correctional Lieutenant C. P. Franco on February 15,
28 2007. (Id. at 81-82) Thus, the prison's response was due no later

1 than March 23, 2007, but Lieutenant Franco did not interview Easter
 2 until April 11, 2007. (Compl. Attach. #1, at 11, ECF No. 1; Mot.
 3 Summ. J. Attach. #3 App. Evidence Ex. N, at 81-82); see Cal. Code
 4 Regs. tit. 15, § 3084.8(c)(2). The grievance was partially granted
 5 at the first level, and the staff response was dated April 14,
 6 2007, signed April 17, 2007, and "returned" to Easter on April 27,
 7 2007. (Compl. Attach. #1, at 11-12, ECF No. 1; Mot. Summ. J.
 8 Attach. #3 App. Evidence Ex. N, at 81-83.)¹⁰

9 D. Foston, the current Chief of Inmate Appeals Branch, states
 10 that Plaintiff did not appeal the decision to the second level
 11 until August 15, 2007; the grievance was therefore screened out as
 12 untimely on August 16, 2007. (Mot. Summ. J. Attach. #3 App.
 13 Evidence Ex. M, at 78, ECF No. 52 (citing id. Ex. O, at 85-86).)
 14 The lapse in time between April 27, 2007, and August 15, 2007, is
 15 the crux of Defendants' contention that Easter failed to exhaust
 16 because his appeal was properly screened out as untimely.

17 The chronology of events surrounding the 07-0491 inmate
 18 grievance was analyzed in the Court's prior report and
 19 recommendation, which was affirmed by the district court. Easter
 20 I, No. 07-cv-00187 L(RBB) (report and recommendation), ECF No. 30;
 21 id., slip op., ECF No. 32. Easter was transferred from Donovan to
 22 Ironwood State Prison on April 18, 2007; he did not receive the
 23 prison's first level response on April 27, 2007; that was merely
 24 the date the response was "returned." Id. (report and
 25

26 ¹⁰ The Director's Level Appeal Decision indicates that the 07-
 27 0491 appeal was returned to Easter on April 27, 2008. (Mot. Summ.
 28 J. Attach. #3 App. Evidence Ex. O, at 85, ECF No. 52.) The Court
 construes this as a typographical error, and finds that the appeal
 was returned to Plaintiff on April 27, 2007. (Id. Ex. M, at 78,
 Ex. N, at 82; see Compl. Attach. #1, at 11-12, ECF No. 1.)

1 recommendation at 14-15), ECF No. 30 ("The evidence supports
2 Plaintiff's contention that he did not receive the first level
3 response until May 22, 2007."); see also id., slip op. at 2, ECF
4 No. 32; (but see Mot. Summ. J. Attach. #3 App. Evidence Ex. M, at
5 78 (citing id. Ex. O, at 85-86).) Easter had fifteen working days
6 from May 22, 2007, to appeal to the second level of review. See
7 Cal. Code Regs. tit. 15, § 3084.6(c). Plaintiff submitted the
8 second level appeal to the Ironwood State Prison appeals office on
9 May 25, 2007. Easter I, No. 07-cv-00187 L(RBB), at 14 (report and
10 recommendation), ECF No. 30; see id., slip op., ECF No. 32; (see
11 also Compl. Attach. #1, at 11-12, ECF No. 1 (bearing an ISP appeals
12 office stamp dated May 25, 2007).)

13 Although the prison had twenty working days to respond to this
14 second level appeal, Easter did not receive the August 4, 2007
15 response until August 9, 2007, which was well beyond the twenty-day
16 requirement. See Cal. Code Regs. tit. 15, § 3084.6(b)(3); Easter
17 I, No. 07-cv-00187 L(RBB) (report and recommendation at 15), ECF
18 No. 30; see also id., slip op. at 2, ECF No. 32. The prison
19 returned Easter's second level appeal to him, not because it was
20 untimely, but because he should have submitted it directly to
21 Donovan. Easter I, No. 07-cv-00187 L(RBB) (report and
22 recommendation at 15), ECF No. 30; see also id., slip op. at 2, ECF
23 No. 32.

24 In his Opposition to the Motion to Dismiss in Easter I,
25 Plaintiff submitted a letter from the Ironwood State Prison Appeals
26 Coordinator that stated, "This appeal needs to be forward [sic]
27 directly to RJD from the appellant. Appeal dated 11/29/06."
28 Easter I, No. 07-cv-00187 L(RBB) (Pl.'s Opp'n 26, ECF No. 26).

1 Easter's appeal was not rejected. Section 3084.3 of the Rules and
2 Regulations of the Director of Corporations lists eight reasons an
3 inmate appeal may be rejected. Cal. Code Regs. title 15, § 3084.3.
4 Exceeding the time limit for submitting the appeal when the
5 appellant had the opportunity to file within the prescribed time
6 constraints is a recognized ground for rejection. Id. Submitting
7 the appeal to the wrong institution is not. Id.

8 Plaintiff resubmitted the appeal to Donovan. (Mot. Summ. J.
9 Attach. #3 App. Evidence Ex. M, at 78 (citing id. Ex. O, at 85-
10 86)); see Easter I, No. 07-cv-00187 L(RBB) (report and
11 recommendation at 15), ECF No. 30; see also id., slip op. at 2, ECF
12 No. 32. The second level appeal was received on August 15, 2007,
13 and screened out as untimely the next day, August 16, 2007. (Mot.
14 Summ. J. Attach. #3 App. Evidence Ex. M, at 78 (citing id. Ex. O,
15 at 85-86)); see Cal. Code Regs. tit. 15, §§ 3084.3(c)(6),
16 3084.6(c).

17 Even with his transfer to ISP and the corresponding delays in
18 the prison's processing and transmission of his grievance, each of
19 Easter's appeals was timely submitted in accordance with title 15,
20 section 3084.6 of the California Code of Regulations. He received
21 the first level response on May 22, 2007, and appealed the decision
22 three days later; the appeal was returned to him on August 9, 2007,
23 because he should have submitted it directly to Donovan. Easter I,
24 No. 07-cv-00187 L(RBB) (report and recommendation at 14-15), ECF
25 No. 30; see also id., slip op. at 2, ECF No. 32. Plaintiff then
26 resubmitted the second level appeal to Donovan, which received it
27 six days later, on August 15, 2007, but the prison screened it out
28 the next day as untimely. (Mot. Summ. J. Attach. #3 App. Evidence

1 Ex. M, at 78 (citing id. Ex. O, at 85-86).) Therefore, Plaintiff's
2 appeal was screened out in error because it was submitted on time.

3 "[I]mproper screening of an inmate's administrative grievances
4 renders administrative remedies 'effectively unavailable' such that
5 exhaustion is not required under the PLRA. If prison officials
6 screen out an inmate's appeals for improper reasons, the inmate
7 cannot pursue the necessary sequence of appeals, and administrative
8 remedies are therefore plainly unavailable." Sapp v. Kimbrell, 623
9 F.3d 813, 823 (9th Cir. 2010). To fall within this exception, an
10 inmate must demonstrate (1) he actually filed a grievance that, if
11 pursued through all levels, would have properly exhausted the claim
12 he seeks to pursue in federal court, and (2) prison officials
13 screened the grievance for reasons unsupported by their
14 regulations. Id. at 823-24.

15 Here, the first requirement is satisfied because the 07-0491
16 grievance would have properly exhausted Easter's Eighth Amendment
17 if it had been pursued through all levels. See id. Defendants do
18 not dispute that this grievance adequately put the prison on notice
19 of the problem Easter now seeks to address. Id. The second
20 requirement is also met because prison authorities improperly
21 screened out the 07-0491 grievance. See id. at 825. The appeal
22 was deemed untimely based on the mistaken assumption that Easter
23 received the response on April 27, 2007, but did not appeal it
24 until August 15, 2007. In the meantime, Easter was transferred to
25 ISP; he submitted his appeal there, and then forwarded the appeal
26 to Donovan. Easter took appropriate steps to exhaust and was
27 prohibited from doing so, not because of his delay, but because of
28

1 the prison's mistake. See Nunez v. Duncan, 591 F.3d 1217, 1224
2 (9th Cir. 2010).

3 Defendants have not shown that Plaintiff received notification
4 that his grievance was screened out. (See Opp'n 11, Mar. 24, 2011,
5 ECF No. 76.) Despite raising and briefing this exact issue in
6 their motion to dismiss in Easter I, this is the first time the
7 Defendants have asserted that the second level grievance was
8 screened out as untimely on August 16, 2007. Easter I, No. 07-cv-
9 00187 L(RBB) (report and recommendation at 15), ECF No. 30
10 ("Although the Defendants filed their Reply to Plaintiff's
11 Opposition on October 22, 2007, they have produced no evidence that
12 Plaintiff's appeal was rejected as untimely, which would end his
13 right to appeal further."); see also id., slip op. at 2, ECF No. 32
14 ("The Magistrate Judge found that the prison authorities had not at
15 any level or at any time rejected Plaintiff's grievance as
16 untimely."). At the time of Judge Lorenz's opinion, dated November
17 20, 2008, there was no evidence that Easter had received any
18 response from Donovan officials regarding his appeal. Easter I,
19 No. 07-cv-00187 L(RBB), slip op. at 2, ECF No. 32 ("[T]he court is
20 troubled by the prison authorities' unresponsiveness in processing
21 Plaintiff's grievance after February 7, 2007.").

22 Plaintiff continues to assert he never received a response to
23 his second level appeal. (Opp'n 11, Mar. 24, 2011, ECF No. 76
24 ("[T]hey never return[ed] my other appeal Log # 07-491."); see also
25 Wyatt, 315 F.3d at 1119 (citing law indicating that courts should
26 liberally construe pro se litigants' pleadings, especially
27 regarding issues involving technical requirements). In fact, on
28 February 6, 2008, Plaintiff filed a second appeal complaining of

1 the prison's processing of his initial grievance and inquiring
2 about its status. (Compl. Attach. #1, at 2-10, ECF No. 1; Mot.
3 Summ. J. Attach. #2 Separate Statement Undisputed Facts 6, ECF No.
4 52; id. Attach. #3 App. Evidence Ex. M, at 78, Ex. O, at 85.)

5 The Defendants do not provide the Court with a copy of the
6 prison's response to Easter's second level appeal in #RJD-07-0491,
7 screening it out as untimely. Cal. Code Regs. tit. 15, § 3084.3(d)
8 (stating that when rejecting an appeal, the appeals coordinator
9 must issue a written rejection explaining why the appeal is
10 unacceptable.) The only evidence that this screened-out grievance
11 was returned to Plaintiff consists of one sentence in the responses
12 to the subsequent 08-00385 grievance. Without tracing the
13 chronology of Appeal #RJD 07-0491, prison authorities simply
14 concluded that the second level appeal was submitted on August 15,
15 2007, and returned to Easter. (See Compl. Attach. #1, at 4
16 (informal response to RJD 08-385); id. at 9-10 (second level appeal
17 response to RJD 08-0385); (Mot. Summ. J. Attach. #3 App. Evidence
18 Ex. M, at 78, Ex. O, at 85 (director's level appeal response to RJD
19 08-0385). The director's level decision in 08-0385 states that a
20 review was conducted, and it was determined that Easter's appeal
21 rights were not violated. (Id. Ex. O, at 85.) The Defendants have
22 submitted minimal evidence of the screened appeal, and the evidence
23 is insufficient to meet their burden of proving nonexhaustion.
24 Wyatt, 315 F.3d at 1119.

25 Several courts have found exceptions to the PLRA's exhaustion
26 requirement in light of the Ninth Circuit's decision in Ngo v.
27 Woodford. Nunez, 591 F.3d at 1224. The PLRA only requires that a
28 prisoner exhaust administrative remedies that "are available." 42

1 U.S.C. 1997e(a). When circumstances render an inmate's remedies
2 "effectively unavailable," he is excused from the exhaustion
3 requirement. Nunez, 591 F.3d at 1226; see id. at 1224 (quoting
4 Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008); see also
5 Viet Mike Ngo v. Woodford, 539 F.3d 1108, 1110 (9th Cir. 2008))
6 (suggesting that an inmate can be excused from any failure to
7 exhaust remedies when prison staff obstructs the grievance
8 process). The burden rests on the defendants to show what remedies
9 were indeed available to the inmate and how he failed to take
10 advantage of the remedies. Williams v. Cate, No. 1:09-cv-00468 OWW
11 JLT (PC), 2011 U.S. Dist. LEXIS 30834, at *6 (E.D. Cal. Mar. 24,
12 2011).

13 The Defendants have not provided the Court with proof that
14 Easter received the second level appeal response from the prison on
15 August 16, 2007. They do not address Easter's contention that he
16 never received the screened-out second level appeal, and they
17 provide insufficient proof that it was returned to Plaintiff.
18 (Opp'n 11, Mar. 24, 2011, ECF No. 76; Reply 2-3, Apr. 7, 2011, ECF
19 No. 77; see Burrows v. Gifford, No. 1:06-CV-0602-AWI-WMW-PC, 2007
20 U.S. Dist. LEXIS 72077, at *6-8 (E.D. Cal. Sept. 27, 2007) (finding
21 defendants did not meet their burden of proving nonexhaustion when
22 they failed to rebut plaintiff's claim that officials did not
23 properly process his appeal).

24 The Defendants have not carried their burden of proving
25 nonexhaustion. Wyatt, 315 F.3d at 1119; Ming Chin Jin, 2005 U.S.
26 Dist. LEXIS 28083, at *6; see Parks Sch. of Bus., Inc. v.
27 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) (construing the
28 complaint in the light most favorable to the plaintiff). For all

1 of these reasons, Defendants' request that the Court dismiss
 2 Plaintiff's deliberate indifference claims for failure to exhaust
 3 should be **DENIED**.

4 **V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

5 Perez, Panichello, and Morris also move for summary judgment
 6 on the merits. The Defendants assert Plaintiff's Eighth Amendment
 7 claim against each of them fails as a matter of law because each
 8 was unaware that Plaintiff would be assaulted in the second prison
 9 riot. (Mot. Summ. J. 2, ECF No. 52; id. Attach. #1 Mem. P. & A.
 10 5.) Defendants also argue that they are entitled to qualified
 11 immunity because that their actions were made in good faith and
 12 with a reasonable belief that they were lawful. (Mot. Summ. J. 2,
 13 ECF No. 52; id. Attach. #1 Mem. P. & A. 5.)

14 Most of Plaintiff's original claims did not survive
 15 Defendants' Motion to Dismiss. (See Order Adopting Report &
 16 Recommendation 2, ECF No. 30; see also Report & Recommendation 24-
 17 25, ECF No. 29.) Therefore, Plaintiff may only pursue his Eighth
 18 Amendment claim against Perez, Panichello, and Morris for failing
 19 to protect him from harm, and Easter may only seek compensatory and
 20 punitive damages against Defendants in their individual capacities.
 21 (See Order Adopting Report & Recommendation 2-3, ECF No. 30; see
 22 also Report & Recommendation 10, 15, 24, ECF No. 29.) The
 23 Plaintiffs's other claims and requests for relief have been
 24 dismissed. (Order Adopting Report & Recommendation 2-3, ECF No.
 25 30; see also Report & Recommendation 24-25, ECF No. 29.)

26 **A. The Plaintiff's Request for Additional Discovery**

27 As an initial matter, the Plaintiff opposes the Motion, in
 28 part, with a claim that he needs additional discovery. In its June

1 9, 2010 Case Management Conference Order Regulating Discovery and
2 Other Pretrial Proceedings, this Court ordered that all discovery
3 shall be completed by December 6, 2010 [ECF No. 35]. Although this
4 deadline has passed, Easter argues intermittently throughout his
5 opposition papers that he should be given time to take additional
6 discovery. (See Opp'n 1-2, Mar. 2, 2011, ECF No. 66; Opp'n 3, Mar.
7 7, 2011, ECF No. 73; Opp'n 2, Mar. 24, 2011, ECF No. 76.) For
8 example, Plaintiff briefly contends that the depositions of other
9 officers would support the facts he has alleged. (Opp'n 2, Mar. 24,
10 2011, ECF No. 76.) Easter appears to assert that he communicated
11 his safety concerns to Defendant Morris by complaining to the
12 housing officer Morris sent to talk to Plaintiff; Easter explains
13 that the "building 16 officer" would testify that this occurred.
14 (Id. at 8.) Further, Plaintiff alleges he needs to obtain the
15 remaining facts from Defendants, like "154, video's tape's [sic] and
16 some officer's statements" that were "hard for [him] to get" because
17 he is incarcerated. (Id. at 11.)

18 When a nonmoving party requests additional discovery to oppose
19 summary judgment, it bears the burden of showing that "additional
20 discovery would uncover specific facts which would preclude summary
21 judgment," and that the evidence sought indeed exists. Maljack
22 Prods., Inc. v. Goodtimes Home Video Corp., 81 F.3d 881, 888 (9th
23 Cir. 1996) (under Rule 56(f)); see Terrell v. Brewer, 935 F.2d 1015,
24 1018 (9th Cir. 1991); Garrett v. City and County of San Francisco,
25 818 F.2d 1515, 1518 (9th Cir. 1987). The plaintiff must do more
26 than make vague assertions that additional discovery would reveal
27 "needed, but unspecified, facts." In re Hanford Nuclear Reservation
28 Litig., 894 F. Supp. 1436, 1452 (E.D. Wash. 1995).

1 Easter has not shown that any of the mentioned discovery would
 2 uncover specific facts precluding summary judgment. See Fed. R.
 3 Civ. P. 56(d); Maljack Prods., Inc., 81 F.3d at 888; In re Hanford
 4 Nuclear Reservation Litig., 894 F. Supp. at 1452. Nor has the
 5 Plaintiff established good cause for amending the current scheduling
 6 order to reopen discovery. (See Case Management Conference Order 1,
 7 6, ECF No. 35 ("The dates and times set forth herein will not be
 8 modified except for good cause shown.")) Easter was given six
 9 months to obtain discovery in support of his case. (See id. at 1.)

10 The nonmoving party seeking additional time to obtain discovery
 11 to oppose summary judgment must show that it has been diligent in
 12 pursuing discovery; it must specify the facts sought and explain
 13 their reference; and it must explain why, despite its diligence, the
 14 facts are currently unavailable. See 11 James Wm. Moore, et al.,
 15 Moore's Federal Practice § 56.100[4], at 56-262 (3d ed. 2011)
 16 (discussing relief under Rule 56(d)). Easter's request for
 17 additional discovery pursuant to Rule 56(d) falls short and is
 18 **DENIED.** See also S.D. Cal. Civ. L.R. 16.1(b) (requiring that pro se
 19 plaintiffs proceed with diligence and take necessary steps to
 20 prepare their cases). The Court will consider Defendants' Motion
 21 for Summary Judgment based on the record currently before it.

22 **B. Eighth Amendment Claim: Failure to Protect**

23 "[T]he treatment a prisoner receives and the conditions under
 24 which he is confined are subject to scrutiny under the Eighth
 25 Amendment." Helling v. McKinney, 509 U.S. 25, 31 (1993). The
 26 Eighth Amendment "requires that inmates be furnished with the basic
 27 human needs, one of which is 'reasonable safety.'" Id. at 33
 28 (quoting Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S.

1 189, 200 (1989)). Therefore, a plaintiff has a right to be
2 protected from violence while in custody. Farmer v. Brennan, 511
3 U.S. 825, 833 (1994); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir.
4 2000); Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir.
5 1989). "Prison officials must take reasonable steps to protect
6 inmates from physical abuse." Hoptowit v. Ray, 682 F.2d 1237, 1250
7 (9th Cir. 1982). When the state takes a person into custody, the
8 Constitution imposes a duty to assume some responsibility for his
9 safety and well-being. Deshaney, 489 U.S. at 1005.

10 To establish an Eighth Amendment violation, a plaintiff must
11 show that the defendant acted with deliberate indifference to a
12 substantial risk of serious harm to the prisoner's safety. Farmer,
13 511 U.S. at 834; see Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir.
14 1995); Madrid v. Gomez, 889 F. Supp. 1146, 1267-68 (N.D. Cal. 1995).
15 The prison official is only liable when two requirements are met;
16 one is objective, and the other is subjective. Farmer, 511 U.S. at
17 834; see Foster v. Runnels, 554 F.3d 807, 812 (9th Cir. 2009).
18 First, the purported violation must be objectively "sufficiently
19 serious." Farmer, 511 U.S. at 834 (citing Wilson v. Seiter, 501
20 U.S. 294, 298 (1991)). Second, the prison official must
21 subjectively "know of and disregard an excessive risk to inmate
22 health or safety." Id. at 837.

23 In their Motion for Summary Judgment, the Defendants contend
24 they were not aware of any threat to Easter's safety because there
25 was no evidence demonstrating he was at risk of being attacked, and
26 Plaintiff did not put Defendants on notice of any safety concerns.
27 (Mot. Summ. J. Attach. #1 Mem. P. & A. 12, ECF No. 52.) Assuming
28 they knew that Easter had been previously attacked in yard four, the

1 Defendants argue, they would not be precluded from housing Plaintiff
2 in yard four in the future unless they knew the identities of
3 Easter's specific enemies. (Id. at 14.)

4 **1. Objective Requirement: Sufficiently Serious Deprivation**

5 To establish an Eighth Amendment claim, the alleged deprivation
6 must be "objectively, 'sufficiently serious.'" Farmer, 511 U.S. at
7 834 (quoting Wilson, 501 U.S. at 298). In cases alleging prison
8 authorities' failure to prevent harm, the inmate may satisfy the
9 "sufficiently serious" requirement by showing that "he is
10 incarcerated under conditions posing a substantial risk of serious
11 harm" to him. Id. Courts must consider the seriousness of the
12 potential harm and whether society deems the risk to be so grave
13 that it violates standards of decency. Helling, 509 U.S. at 36; see
14 Hudson v. McMillian, 503 U.S. 1, 8 (1992).

15 Defendants Perez, Panichello, and Morris do not explicitly
16 address this standard. Instead, they repeatedly assert they were
17 not "deliberately indifferent" because there was "no identifiable
18 threat to plaintiff's safety," which is, in fact, responsive to the
19 subjective element. (Mot. Summ. J. Attach. #1 Mem. P. & A. 12-16,
20 ECF No. 52); see Farmer, 511 U.S. at 834, 837 (explaining that an
21 inmate must first show the purported violation was objectively
22 "sufficiently serious," and then must demonstrate that the prison
23 officials were subjectively "deliberately indifferent").

24 The Defendants argue that they lacked the requisite subjective
25 intent. (See Mot. Summ. J. Attach. #1 Mem. P. & A. 12, 14-16, ECF
26 No. 52 ("Defendants were not deliberately indifferent to Plaintiff's
27 safety."); see also id. at 15 ("[The record] does not demonstrate
28 that the defendants were aware of an identifiable risk to

1 plaintiff's safety."); id. at 16 (citing Del Raine v. Williford, 32
2 F.3d 1024 (7th Cir. 1994), to argue that "the subjective component
3 is not established and the suit fails."); id. at 20 ("Further,
4 defendants were not deliberately indifferent to plaintiff's safety
5 by transferring him to facility in which he had no enemies or
6 identifiable safety concerns.").

7 Nonetheless, it could be inferred that Defendants are
8 suggesting that because each of them was unaware Easter would be
9 assaulted in the second riot, Plaintiff did not face a substantial
10 risk of harm. (See Mot. Summ. J. Attach. #1 Mem. P. & A. 12-16, ECF
11 No. 52); but see Broadway, 2009 U.S. Dist. LEXIS 21132, at *15-16.
12 Regardless of the manner in which the Court construes Defendants'
13 arguments, a genuine issue of fact exists as to the objective
14 element of the Eighth Amendment inquiry.

15 The Defendants argue at length that there was no "identifiable"
16 threat to Easter's safety in yard four on November 14, 2006. (Mot.
17 Summ. J. Attach. #1 Mem. P. & A. 5, 12, ECF No. 52.) They submit
18 that Plaintiff did not participate in the August 27, 2006 riot.
19 (Id.; see Reply 3, Apr. 7, 2011, ECF No. 77.) Defendants rely on
20 the medical examiner's conclusion that Plaintiff had "no seen
21 injury" after the fight, as well as the Rules Violation Report
22 showing Plaintiff was ultimately disciplined for "behavior which may
23 lead to violence." (Mot. Summ. J. Attach. #1 Mem. P. & A. 5, 12,
24 ECF No. 52 (citing id. Attach. #2 Separate Statement Undisputed
25 Facts 2); see Reply 3, Apr. 7, 2011, ECF No. 77 (citing id. Attach.
26 #1 Decl. Cunningham 3).) Defendants further maintain that Plaintiff
27 had no enemies on September 28, 2006, when his enemy list was
28 updated before the November 17, 2006 riot. (Mot. Summ. J. Attach.

1 #1 Mem. P. & A. 5, 12, ECF No. 52.) Also, the classification
2 committee evaluated Easter on September 29, 2006, to determine
3 whether he should be released from AS back to the general prison
4 population, and Easter did not mention any safety concerns about
5 facility four. (Id. at 14-15 (citing id. Attach. #2 Separate
6 Statement Undisputed Facts 3).) Defendants argue that inmate Hill,
7 the prisoner who stabbed Plaintiff during the second riot, was not
8 involved in the first fight. (Id. at 8-9 (citing id. Attach. #2
9 Separate Statement Undisputed Facts 5).) Because neither Plaintiff
10 nor Hill participated in the August 2006 riot, and Hill was never an
11 identified as an enemy of Easter's, Defendants state there was no
12 known threat to Plaintiff's safety in yard four. (Id. (citing id.
13 Attach. #2 Separate Statement Undisputed Facts 2, 5-6).)

14 In his Opposition, Plaintiff essentially contends that his
15 placement back to yard four subjected him to a substantial risk of
16 harm. Farmer, 511 U.S. at 834; see Thomas v. Ponder, 611 F.3d 1144,
17 1150 (9th Cir. 2010) (construing the filings of pro se inmates
18 liberally). Easter asserts he was attacked by approximately fifteen
19 skin heads during the August 27, 2006 riot. (Compl. 2, 5, ECF No.
20 1; Opp'n 1, 5-6, Apr. 1, 2011, ECF No. 76.) The medical report
21 reveals that Plaintiff was "rushed by the white race," and the
22 chrono indicates he was sent to administrative segregation for
23 "participating in a riot." (Opp'n 1, 5-6, Apr. 1, 2011, ECF No. 76
24 (citing id. Ex. A, at 13, Ex. B, at 15); see Mot. Summ. J. Attach.
25 #3 App. Evidence Ex. B, at 6, Ex. E, at 12, ECF No. 52.) The
26 classification committee sent Easter and the other African-American
27 inmates to AS because they were "involved" in the riot; thirty days
28 later, they were released from AS to yard two due to security

1 reasons, as the Caucasian prisoners were still in yard four. (Opp'n
2 6, Mar. 24, 2011, ECF No. 76; see also Mot. Summ. J. Attach. #3 App.
3 Evidence Ex. P, at 100, ECF No. 52.)¹¹ Plaintiff maintains that his
4 CDC 128-B chrono reveals that he was "targeted to be hit" in the
5 November riot due to his participation in the August 2006 riot.
6 (Opp'n 6, Mar. 24, 2011, ECF No. 76 (citing id. Ex. C, at 17); see
7 Mot. Summ. J. Attach. #3 App. Evidence Ex. H, at 45, ECF No. 52.)

8 Easter argues that it would have been impossible for him to
9 have specifically identified inmate Hill as a threat before the
10 November 2006 riot because he did not know who Hill was until Hill
11 stabbed him. (Opp'n 8-9, Apr. 1, 2011, ECF No. 76.) Therefore,
12 Plaintiff submits that he had no way of alerting officials that Hill
13 posed a threat before the second riot; he was concerned for his
14 safety because of the general "ties" the gang had. (Id.) "It was
15 'no coincidence'" that once [Plaintiff] was moved back into building
16 seventeen of yard four, he was attacked again by members from the
17 same gang. (Id. at 10.)

18 The parties dispute whether Plaintiff participated in the first
19 riot. According to the medical report, Easter "stated he was
20 talking to the sergeant, then they were rushed by the white race."
21 (Id. Ex. A, at 13.) The CDC-128G chrono sheet indicates Easter was
22 "placed in AS on 8-27-06 for security concerns, due to him
23 participating in a riot." (Id. Ex. B, at 15.) The chrono, which
24 was prepared before Easter's disciplinary hearing, also states his

25
26 ¹¹ On several occasions throughout his Opposition, Easter
27 references the events as they apply to him and to other African-
28 American prisoners. To the extent Plaintiff attempts to assert the
legal rights of these third-party inmates, he lacks standing to do
so. See Powers v. Ohio, 499 U.S. 400, 410-11 (1991). The Court
will only consider Easter's allegations as they apply to him as an
individual. See id.

1 offense of "Participation in a Riot" is pending adjudication. (Id.)
2 One incident report shows Plaintiff was a "suspect" in the riot but
3 sustained no injuries, and another report lists Plaintiff as a
4 "witness." (Compl. 44, 57, ECF No. 1; Mot. Summ. J. Attach. #3 App.
5 Evidence Ex. I, at 49, ECF No. 52.) A reporting officer wrote,
6 "After 'Code 4' was established I escorted [Easter] to Facility #4
7 Dining Hall for a medical evaluation." (Mot. Summ. J. Attach. #3
8 App. Evidence Ex. I, at 57, ECF No. 52.) Easter was placed in
9 administrative segregation because he "was involved in a riot with
10 weapon requiring the use of force on the Facility IV Yard," and
11 Plaintiff was a threat to the safety of other inmates and to prison
12 security. (Id. Ex. C, at 8.)

13 There is some evidence that Plaintiff merely attempted to
14 participate in the riot, but was not involved. (Mot. Summ. J.
15 Attach. #2 Separate Statement Undisputed Facts 1, ECF No. 52.) The
16 Rules Violation Report attached to Defendants' Motion states that
17 Easter "attempted to get involved, but decided to get down after the
18 37MM was used." (Id. Attach. #3 App. Evidence Ex. A, at 4, ECF No.
19 52.) The medical report indicates that Easter was not injured.
20 (Id. Ex. B, at 6.) Defendant Morris acknowledges, "Plaintiff was
21 found guilty of 'behavior which may lead to violence.'" (Id. Ex. J,
22 at 64.)

23 The Defendants submitted new material, the September 16, 2006
24 Rules Violation Report, with their Reply. "It is improper for a
25 moving party to introduce new facts or different legal arguments in
26 the reply brief than those presented in the moving papers." United
27 States ex rel. Giles v. Sardie, 191 F. Supp. 2d 1117, 1127 (C.D.
28 Cal. 2000) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894-

1 95 (1990)); see Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007)
2 ("The district court need not consider arguments raised for the
3 first time in a reply brief."). Further, Civil Local Rule 7.1
4 provides, "[C]opies of all documentary evidence which the movant
5 intends to submit in support of the motion, or other request for
6 ruling by the court, must be served and filed with the notice of
7 motion." S.D. Cal. Civ. L.R. 7.1(f)(2)(a). Therefore, Defendants
8 improperly submitted new evidence in their Reply, depriving
9 Plaintiff of his opportunity to respond. The report, however, does
10 not prejudice Easter.

11 The parties also dispute the extent of prisoner Hill's
12 involvement in the first riot, if any. Easter testified that
13 although he did not know their specific names, some of the inmates
14 were involved in both riots. (Mot. Summ. J. Attach. #3 App.
15 Evidence Ex. P, at 92.) ("You have to go through the paperwork to
16 find out these individuals, but there was some that was involved in
17 the first [riot], the reason why the second [riot] happened." (Id.)
18 Plaintiff further testified that inmate Hill could have been
19 involved in the first riot, but he was not sure because he did not
20 know who everyone was. (Id. at 94.) Defendants, on the other hand,
21 cite to the crime incident reports for both riots and to Defendant
22 Morris's Declaration to argue Hill was not involved in the first
23 fight. (Mot. Summ. J. Attach. #2 Separate Statement Undisputed
24 Facts 5, ECF No. 52.)

25 Although the August 27, 2006 incident report does not mention
26 inmate Hill, the November 14, 2006 report lists Hill as a
27 participating prisoner and reveals that he did not arrive at Donovan
28 until October 31, 2006. (See Mot. Summ. J. Attach. #3 App. Evidence

1 Ex. G, at 18, 22, Ex. I, at 47-61, ECF No. 52.) Based on this
2 evidence, there is no issue of material fact as to whether Hill was
3 involved in the first riot. The record shows he was not housed at
4 Donovan on August 27, 2005, and Easter presents no evidence to the
5 contrary. (Id.)

6 Two of Plaintiff's subsequently-identified enemies were
7 involved in both riots. The Defendants allege Easter's enemy list
8 was updated "on the date of the incident," November 14, 2006, and
9 again on April 16, 2007, yet they only provide the Court with the
10 April 16, 2007 "safety/enemy concerns" general chrono. (Id. Attach.
11 #1 Mem. P. & A. 5 (citing id. Attach. #3 App. Evidence Ex. H, at
12 45).) The chrono reveals the names of fifteen Caucasian inmates who
13 posed a threat to Easter's safety. (Mot. Summ. J. Attach. #3 App.
14 Evidence Ex. H, at 45, ECF No. 52.) The evidence demonstrates that
15 enemy-inmates Bondurant, T. (V-40228) and Morain, Gregory (T-76999)
16 were involved in both riots. (Id.; compare id. Ex. I, at 50, 54
17 (showing that Bondurant and Morain, or "Morgan," participated in the
18 August 27, 2006 riot), with id. Ex. G, at 24, 27 (reflecting
19 Bondurant's and Morain's involvement in the November 14, 2006 riot);
20 see also Compl. 44, ECF No. 1.)

21 Easter repeatedly contends he feared members of the Caucasian
22 prison gang, the skin heads, that purportedly attacked him on both
23 occasions. (Compl. 2, ECF No. 1; Mot. Summ. J. Attach. #3 App.
24 Evidence Ex. N, at 81, 83, ECF No. 52; Opp'n 1, 8-10, Apr. 1, 2011,
25 ECF No. 76 (stating that members of the skin heads hate "torch
26 blacks"); contra Mot. Summ. J. Attach. #1 Mem. P. & A. 15-16, ECF
27 No. 52 (asserting that Plaintiff states a general concern for
28 inmates of the white race at large).) In his grievance, the

1 Plaintiff stated that on August 27, 2006, he was attacked by twenty-
2 five to thirty skin heads, and on November 14, 2006, fifteen skin
3 heads rushed him again with knives. (Mot. Summ. J. Attach. #3 App.
4 Evidence Ex. N, at 81, 83, ECF No. 52.) Based on officers' reports
5 attached to the Complaint, there were approximately thirty Caucasian
6 inmates involved in the first riot and fifteen Caucasian prisoners
7 in the second riot. (See Compl. 36, 38-39, 42, 44, 63, 68, 95, ECF
8 No. 1.) Moreover, prison officials subsequently noted on April 16,
9 2007, that Easter was "targeted to be hit" in the November 17, 2006
10 riot and that numerous Caucasian inmates posed serious risks of
11 threat to Plaintiff's safety. (Mot. Summ. J. Attach. #3 App.
12 Evidence Ex. H, at 45, ECF No. 52.) "Only I/M Hill . . . was
13 identified as the assailant in the stabbing; however, other white
14 inmates were also involved and care should be taken when placing
15 them in the facility yard" (Id.)

16 The record establishes that there was a large number of white
17 and black prisoners fighting, the riots were racially-motivated, and
18 the participating prisoners were potential gang members. A trier of
19 fact could reasonably find that more than just inmate Hill posed a
20 threat to Easter's safety. (See Mot. Summ. J. Attach. #3 App.
21 Evidence Ex. H, at 45, ECF No. 52.) Viewing the evidence in the
22 light most favorable to Plaintiff, an issue of fact exists as to
23 whether Easter was confined under conditions that posed a
24 "substantial risk of serious harm." See Thomas, 611 F.3d at 1150
25 ("[C]ourts should construe liberally motion papers and pleadings
26 filed by pro se inmates and should avoid applying summary judgment
27 rules strictly."); Olsen v. Idaho State Bd. of Med., 363 F.3d 916,
28 922 (9th Cir. 2004).

1 **2. Subjective Requirement: Deliberate Indifference**

2 After an inmate has shown a triable issue as to whether he
3 suffered a deprivation that was objectively, "sufficiently serious,"
4 he must also establish a triable issue regarding whether the prison
5 officials had a "sufficiently culpable state of mind," acting with
6 deliberate indifference. Farmer, 511 U.S. at 834; see Thomas, 611
7 F.3d at 1151. "[D]eliberate indifference entails something more
8 than mere negligence . . . [but] is satisfied by something less than
9 acts or omissions for the very purpose of causing harm or with
10 knowledge that harm will result." Farmer, 511 U.S. at 835.
11 Liability materializes if the defendant knew the inmate faced a risk
12 of harm and disregarded that risk by failing to take reasonable
13 measures to abate it. Id. at 847. Therefore, demonstrating
14 subjective deliberate indifference involves a two-part inquiry: (1)
15 whether the defendant was subjectively aware of a risk of serious
16 harm to the prisoner's safety, and (2) whether the official had a
17 reasonable justification for the deprivation. Thomas, 611 F.3d at
18 1150-51.

19 "First, the inmate must show that the prison officials were
20 aware of a 'substantial risk of serious harm' to an inmate's health
21 or safety. Id. (citing Farmer, 511 U.S. at 837) (footnote omitted).
22 This may be satisfied if the prisoner establishes that the risk
23 posed by the violation was "obvious." Id. A plaintiff need not
24 show that an "individual prison official had specific knowledge that
25 harsh treatment of a particular inmate, in particular circumstances,
26 would have a certain outcome." Id. "Rather, [courts] measure what
27 is 'obvious' in light of reason and the basic general knowledge that
28 a prison official may be presumed to have obtained regarding the

1 type of deprivation involved." Id. at 1151 (citing Farmer, 511 U.S.
2 at 842). For example, if a substantial risk of inmate attacks was
3 "longstanding, pervasive, well-documented, or expressly noted by
4 prison officials in the past," and the defendant "had been exposed
5 to information concerning the risk and thus 'must have known' about
6 it," a trier of fact could find defendant had actual knowledge of
7 the risk. Farmer, 511 U.S. at 842 (quotations omitted); see also
8 Thomas, 611 F.3d at 1151. Housing an African-American inmate in a
9 yard with Caucasian skin heads within weeks of a race riot is one
10 example of an "obvious" risk. Whether a defendant had the requisite
11 knowledge is a question of fact subject to substantiation in the
12 usual ways, including inferences drawn from circumstantial evidence.
13 Farmer, 511 U.S. at 842.

14 "Second, the inmate must show that the prison officials had no
15 'reasonable' justification for the deprivation, in spite of that
16 risk." Thomas, 611 F.3d at 1150-51 (citing Farmer, 511 U.S. at
17 844). "[P]rison officials who actually knew of a substantial risk
18 to inmate health or safety may be found free from liability if they
19 responded reasonably to the risk, even if the harm ultimately was
20 not averted." Farmer, 511 U.S. at 844.

21 Captain Morris explains that officials may learn of safety
22 threats if the prisoner communicates to staff the identity of the
23 specific individual who poses a threat and explains why the inmate
24 is believed to be a concern; officials then document the enemy in a
25 "CDC Form 128B" chrono. (Mot. Summ. J. Attach. #2 Separate
26 Statement Undisputed Facts 2, ECF No. 52 (citing id. Attach. #3 App.
27 Evidence Ex. J Decl. Morris 64-65).) Morris contends that a
28 prisoner may not place an entire ethnicity on an enemy list. (Id.

1 Attach. #3 App. Evidence Ex. J Decl. Morris 65.) An enemy can be
2 identified if a prisoner is involved in a fight and staff can
3 determine which individuals were involved. (Mot. Summ. J. Attach.
4 #2 Separate Statement Undisputed Facts 3, ECF No. 52.) The
5 Defendants allege that because Plaintiff did not participate in the
6 August 27, 2006 riot, they would have no knowledge of a risk unless
7 Easter directly communicated to them that a certain prisoner posed a
8 threat to Plaintiff's safety, but he never did. (Id. (citing id.
9 Attach. #3 App. Evidence Ex. J. Decl. Morris 64-55).)

10 As discussed above, at a minimum, the record contains facts
11 presenting a genuine issue of fact as to whether Easter participated
12 in the August 2006 riot. Defendants' argument that the only way
13 they could have known of a threat to Easter is if he directly
14 communicated to them a specific risk of harm is not compelling.
15 (Id. (describing that an enemy can be identified if the prisoner is
16 involved in a mutual combat or other incident).)

17 At his deposition, the Plaintiff testified that he was released
18 from administrative segregation directly to prison yard two, and
19 approximately one month later, he was unexpectedly transferred to
20 yard four and asked Captain Morris about the transfer. (Opp'n 6,
21 Apr. 1, 2011, ECF No. 66; Mot. Summ. J. Attach. #3 App. Evidence Ex.
22 P, at 97, ECF No. 52.) Easter argues there was no need to express
23 his safety concerns about facility four to prison officials because
24 he was not released from administrative segregation to yard four,
25 where he had enemies; rather, he was released to yard two, where he
26 did not have any enemies. (Opp'n 6, Apr. 1, 2011, ECF No. 76.)
27 Easter urges that he did his best to informally communicate his
28 worries to prison staff about being on yard four, but they showed no

1 concern. (See id. at 8.) Plaintiff claims he was moved back to the
2 yard that housed members of the skin heads, a well-known, dangerous
3 prison gang that hated "torch blacks." (See id.)

4 According to Defendant Morris, Easter was initially released
5 from administrative segregation on yard two; Officer Perez
6 acknowledges that Easter was transferred from facility two to the
7 reception center of facility four in October 2006, and she assigned
8 him to building seventeen shortly thereafter. (Mot. Summ. J.
9 Attach. #2 Separate Statement Undisputed Facts 3, ECF No. 52; see
10 id. Attach. #3 App. Evidence Ex. J Decl. Morris 65, Ex. L Decl.
11 Perez 73.)

12 The Defendants claim that prison policies require inmates to
13 identify their specific enemies and explain why they are a threat
14 before officials will add them to an enemy list. (Mot. Summ. J.
15 Attach. #3 App. Evidence Ex. J Decl. Morris 64-65, ECF No. 52.)
16 Defendants also allege Donovan policies prohibit prisoners from
17 placing all inmates of a certain ethnicity or race on his enemy
18 list, because "it would be impracticable to segregate the prison by
19 ethnicity." (Id. at 65.) Other than Morris's Declaration, however,
20 the Defendants submit no evidence of these practices.

21 The Notice of Critical Case Information -- Safety of Persons,
22 describes the purpose of the document.

23 This non-confidential form is used to document
24 [inmates] or potential inmates who should be kept separate
25 and [inmates] suspected of affiliation with a prison gang
26 or disruptive group. If an [inmate] is identified with a
27 prison gang, a Notice of Critical Information -- Prison
28 Gang Identification (Form CDC812-A) shall also be
completed. A form CDC 812-B shall be completed on
Disruptive Group Affiliates.

(Id. Ex. D, at 10) (emphasis added). As noted on December 22, 2006,
the form describes Plaintiff's "suspected gang affiliation" as a

1 "member" of the "59 Brim (Blood) prison gang." (Id.) The "primary
2 supporting documentation" for Easter's supposed prison gang
3 association was a "POR dtd 6-26-06 pg 12." (Id.)

4 Even if Defendants' assertion that after a race riot, the
5 prison could not segregate Easter from Caucasian prisoners was a
6 defense, the Complaint is more specific than Defendants suggest.
7 Easter alleges he was attacked by twenty-five to thirty skin heads
8 in the first riot and fifteen skin heads in the second riot, and he
9 contends both fights occurred in prison yard four. (Compl. 2, ECF
10 No. 1; Opp'n 1, 8-10, Apr. 1, 2011, ECF No. 76; see also Mot. Summ.
11 J. Attach. #3 App. Evidence Ex. N, at 81, 83, Ex. D, at 10.)

12 Plaintiff repeatedly references the "skin heads," a gang that
13 is associated with condoning racially-motivated, white power
14 beliefs. (See Compl. 2, ECF No. 1; Mot. Summ. J. Attach. #3 App.
15 Evidence Ex. N, at 81, 83, ECF No. 52; Opp'n 1, 8-10, Apr. 1, 2011,
16 ECF No. 76; see also Opp'n 8, Apr. 1, 2011 (describing that members
17 of the skin head gang hate "torch blacks"), ECF No. 76. The
18 Plaintiff's statements are not that the entire Caucasian race was an
19 enemy, just members of the skin heads.

20 The Court will consider the subjective component of the Eighth
21 Amendment inquiry as it applies to each Defendant separately. See
22 Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) ("The prisoner
23 must set forth specific facts as to each individual defendant's
24 deliberate indifference.").

25 **a. Officer Perez**

26 The Plaintiff alleges Defendant Perez made the decision to
27 transfer Easter from facility two back to facility four even though
28 she could have assigned him to any yard, and his previous fight with

1 skin heads in yard four was documented in his file. (Compl. 2, ECF
2 No. 1; see Opp'n 2, Mar. 11, 2011, ECF No. 73; Opp'n 7, Mar. 24,
3 2011, ECF No. 76.)

4 As a Housing Assignment Officer, Defendant Perez states that
5 her duty is to find available cells to house inmates in yard four.
6 (Mot. Summ. J. Attach. #1 Mem. P. & A. 16, ECF No. 52 (citing Compl.
7 5, ECF No. 1).) The ICC evaluates special conditions relevant to an
8 inmate's housing assignment, such as the location of any enemies,
9 and Perez relies on these determinations when she selects yard
10 assignments for prisoners recently released from administrative
11 segregation. (Id. (citing id. Attach. #2 Separate Statement
12 Undisputed Facts 3-4).) Easter admits he has not communicated with
13 Perez in more than ten years. (Id. (citing id. Attach. #2 Separate
14 Statement Undisputed Facts 4).)

15 The Plaintiff argues that although Officer Perez was the
16 housing officer in yard four, she could have assigned Plaintiff to
17 any prison yard she chose. (Opp'n 7, Mar. 24, 2011, ECF No. 76.)
18 Plaintiff also contends that he never signed any forms agreeing to
19 go back to yard four, and everything was documented regarding where
20 he was supposed to be housed after his release from administrative
21 segregation. (Opp'n 2, Mar. 11, 2011, ECF No. 73.) Easter explains
22 that he never attempted to communicate his safety concerns about
23 yard four to Defendant Perez because she does not speak with
24 prisoners and therefore would not have listened to him anyway.
25 (Opp'n 7, Mar. 24, 2011, ECF No. 76; Mot. Summ. J. Attach. #1 Mem.
26 P. & A. 7, ECF No. 52).)

27 //

28 //

I. Sufficiently obvious risk

Easter must show that Officer Perez was aware of a "substantial risk of serious harm" to Plaintiff. Deliberate indifference requires an actual perception of risk. Thomas v. Hernandez, No. C 01-4685 THE (pr), 2003 U.S. Dist. LEXIS 11272, at *17 (N.D. Cal. June 30, 2003); see also Farmer, 511 U.S. at 840.

The standard does not require that the guard or official "'believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take steps to prevent such an assault. But, on the other hand, he must have more than a mere suspicion that an attack will occur.'"

Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986) (quoting State Bank of St. Charles v. Camis, 712 F.2d 1140, 1146 (7th Cir. 1983)). Advance notification is not a necessary element of an Eighth Amendment failure-to-protect claim. Farmer, 511 U.S. at 849.

Easter was transferred to administrative segregation after the August 27, 2006 riot and was interviewed by the classification committee on August 30, 2006. (Mot. Summ. J. Attach. #2 Separate Statement Undisputed Facts 1-2, ECF No. 52; see Compl. 5, ECF No. 1; Opp'n 1,6, ECF No. 76.) On September 29, 2006, the committee met with Easter again and reviewed his central file before determining that he could return to the general population; Plaintiff was transferred to yard two without expressing safety concerns regarding enemies in yard four. (Mot. Summ. J. Attach. #2 Separate Statement Undisputed Facts 3, ECF No. 52; id. Attach. #3 App. Evidence Ex. K Decl. Panichello 70; see also id. Ex. J Decl. Morris 65; Opp'n 6-7, Apr. 1, 2011, ECF No. 76.) The record does not contain a copy of the chrono from the committee's September 29, 2006 review, although a copy of the chrono from the committee's August 30, 2006 interview

1 of Easter is before the Court. (See Mot. Summ. J. Attach. #2
2 Evidence Ex. E, at 12.)

3 In October 2006, Easter was removed from facility two and
4 transferred to the reception center in yard four where he stayed
5 temporarily until Perez determined where he should be located.
6 (Compl. 3, ECF No. 1; Mot. Summ. J. Attach. #2 Separate Statement
7 Undisputed Facts 3, ECF No. 52; id. Attach. #3 App. Evidence Ex. L
8 Decl. Perez 73; Opp'n 5-6, Apr. 1, 2011, ECF No. 76.) According to
9 Perez, "The purpose of the Reception Center is to provide short-term
10 housing for inmates while they are processed and classified. After
11 an inmate is evaluated, and an appropriate institutional placement
12 has been made, the inmate is then moved to a non-temporary housing
13 unit or endorsed." (Mot. Summ. J. Attach. #3 App. Evidence Ex. L
14 Decl. Perez 73, ECF No. 52.) Soon after Plaintiff was transferred
15 to the reception center, Perez assigned him to housing in facility
16 four. (Id. Attach. #2 Separate Statement Undisputed Facts 3, ECF
17 No. 52; id. Attach. #3 App. Evidence Ex. L Decl. Perez 73.)

18 Easter alleges that Officer Perez had control over Plaintiff's
19 yard assignment and could have assigned him to any yard she chose.
20 (Opp'n 7, Mar. 24, 2011, ECF No. 76; see Mot. Summ. J. Attach. #1
21 Mem. P. & A. 16, ECF No. 52.)

22 Defendant Perez explains that since 2006, she has been a
23 Correctional Officer assigned to "Inmate Housing Assignments" at
24 Donovan. (Mot. Summ. J. Attach. #3 App. Evidence Ex. L Decl. Perez
25 72, ECF No. 52.) She states, "I am responsible for transferring
26 inmates from the Reception Center at Building No. 16, to housing
27 units 17-20, and the dormitory (Facility IV), once they are
28 processed and space becomes available." (Id. at 72-73.) Inmates

1 are "processed and classified" while they are held in the reception
2 center. (Id. at 73.) A triable issue of fact exists as to whether
3 Perez had the authority to assign Easter to a yard other than yard
4 four. Even if she had the authority to transfer Easter to a
5 different facility and yard, the trier of fact must determine
6 whether Perez knew that keeping Plaintiff in facility four and on
7 yard four would subject him to a risk of harm. See Thomas, 611 F.3d
8 at 1151.

9 Plaintiff insists that his inmate file contained incident
10 reports documenting the first racial riot as well as instructions as
11 to where he and other African-American inmates should be housed upon
12 their release from administrative segregation. (Compl. 2, ECF No.
13 1; Opp'n 2, Mar. 11, 2011, ECF No. 73.) A prisoner's central file
14 contains "documents and entries in documents pertaining to an inmate
15 that are prepared at or near the time of the occurrence by persons
16 with knowledge of the circumstances or events." (Reply Apr. 7,
17 2011, Attach. #1, at 1, ECF No. 77.)

18 A trier of fact could also find that after reviewing
19 Plaintiff's central file, the risk to Easter's safety in prison yard
20 four would have been "obvious" to Perez. She was responsible for
21 locating appropriate housing for Easter, and if Perez reviewed his
22 central file, she would have been aware that Plaintiff was recently
23 disciplined for participating in a large-scale, racially-motivated
24 riot in facility four approximately one month earlier. (Mot. Summ.
25 J. Attach. #2 Separate Statement Undisputed Facts 1, ECF No. 52; see
26 Compl. 5, ECF No. 1; Opp'n 1, ECF No. 76); see Swan v. United States
27 of America, 159 F. Supp. 2d 1174, 1182 (N.D. Cal. 2001) ("[T]urning
28

1 a blind eye to the relevant surrounding facts will not shield a
2 prison official from liability.")

3 Easter's involvement in the racial riot with Caucasian, skin
4 head inmates in facility four was well documented. Officer Perez
5 does not allege she was unaware of the racial riot at facility four,
6 that Plaintiff was disciplined for participating in the first riot,
7 or that the Caucasian inmates still remained in facility four. See
8 also Bejarano v. NDOC, No. 3:08-CV-00256-RAM, 2011 U.S. Dist. LEXIS
9 6180, at *19 (D. Nev. Jan. 19, 2011) (denying defendants summary
10 judgment when the evidence suggested that plaintiff's involvement in
11 a prior assault with members of the Sureno gang was documented, and
12 other Sureno members had been transferred to the same facility along
13 with plaintiff). The minimal time between the August 27, 2006 riot
14 and Perez's decision to keep Easter in the same yard in October 2006
15 is additional evidence that creates a triable issue of material
16 fact. See Farmer, 511 U.S. at 842 (finding issue of fact when
17 evidence illustrated that a risk of inmate attacks was well-
18 documented or expressly noted by prison officials in the past, and
19 that defendant had been exposed to information concerning the
20 attacks); see also Thomas, 611 F.3d at 1151 (explaining that in
21 determining whether a risk to an inmate's health is obvious, a
22 prison official is deemed to have the general knowledge of an
23 individual performing the functions of that job).

24 Perez's assertion that there were no enemies on Easter's enemy
25 list before the second riot is insufficient to entitle her to
26 summary judgment. The chrono that shows Easter had no enemies up
27 through March 1, 2007, which is more than three months after the
28 November 2006 attack, also shows that Easter had a suspected gang

1 affiliation with "59 Brim (Blood)." (Mot. Summ. J. Attach. #3 App.
2 Evidence Ex. D, at 10, ECF No. 52.)

3 Moreover, the Supreme Court has expressly rejected Defendants'
4 argument that Easter was required to alert them of a threat from a
5 specific individual. Farmer, 511 U.S. at 849.

6 Because the District Court may have mistakenly
7 thought that advance notification was a necessary element
8 of an Eighth Amendment failure-to-protect claim, we think
it proper to remand . . . for application of the Eighth
Amendment principles explained above.

9 The District Court's opinion is open to the reading
10 that it required not only advance notification of a
substantial risk of assault, but also advance notification
11 of a substantial risk of assault posed by a particular
fellow prisoner. See App. 124 (referring to "a specific
12 threat to [a prisoner's] safety"). The Eighth Amendment,
however, imposes no such requirement.

13 Id.; id. at n.10 (citation omitted).
14

15 Easter was disciplined for his involvement in the prior race
16 riot. Incident reports and related documents were in Plaintiff's
17 central file. "Although the obviousness of a risk is not
18 conclusive," Defendant Perez does not avoid liability if she merely
19 "declined to confirm inferences of risk that [she] suspected to
20 exist" Farmer, 511 U.S. at 843 n.8.

21 Reasonable minds could differ as to whether Perez was
22 deliberately indifferent to a substantial risk leaving Easter at
23 facility four could lead to serious harm.

24 **ii. No reasonable justification**

25 Defendant Perez does not acknowledge there was a risk or threat
26 to Plaintiff's safety and does not argue that she responded
27 reasonably to the risk. See Farmer, 511 U.S. at 844. From her
28 declaration, it is unclear whether Officer Perez maintains that she

1 lacked the authority to reassign Easter to a different yard if he
2 had enemies at facility four. (See Mot. Summ. J. Attach. #3 App.
3 Evidence Ex. L Decl. Perez 72-74, ECF No. 52.) Assuming she lacked
4 that authority, at a minimum, a reasonable response to a serious
5 safety concern would be to refer Easter's request to others. See
6 Longoria v. State of Texas, 473 F.3d 586, 594 (5th Cir. 2006). The
7 reasonableness of her response raises issues of material fact that
8 cannot be resolved by summary judgment. A finder of fact could
9 determine that Perez's decision not to transfer Plaintiff from yard
10 four was unreasonable. See Thomas, 611 F.3d at 1150; see also
11 Farmer, 511 U.S. at 844-45.

12 For all of these reasons, Officer Perez's Motion for Summary
13 Judgment regarding Easter's Eighth Amendment claim against her
14 should be **DENIED**.

15 **b. Lieutenant Panichello**

16 Easter contends that Lieutenant Panichello escorted Plaintiff
17 from facility two to facility four despite Plaintiff's verbal
18 statements to the lieutenant that he should not be transferred back
19 to that prison yard. (Opp'n 2, Mar. 11, 2011, ECF No. 73; Opp'n 2,
20 6-7, Mar. 24, 2011, ECF No. 76.)

21 In his Motion, Defendant Panichello submits that he does not
22 recollect Plaintiff communicating even a general safety concern
23 about being rehoused in yard four. (Mot. Summ. J. Attach. #1 Mem.
24 P. & A. 17, ECF No. 52.) Even if this occurred, the lieutenant
25 contends Easter has not identified a specific threat to his safety.
26 (See id.) He asserts that Easter does not elaborate as to what he
27 "expressed" to the lieutenant, and there was no reason for him to
28 knew that for safety reasons, Plaintiff should not be moved to

1 facility four. (Reply 5-6, Apr. 7, 2011, ECF No. 77.) The
2 Defendant argues that to be liable, he must have had more than a
3 mere suspicion that an attack would occur. (Id. at 6 (citing Berg,
4 794 F.2d at 459).)

5 In his Opposition, the Plaintiff contends he informally
6 expressed his concerns to Panichello about being rehoused in yard
7 four, but Defendant's response was "we have no where el[s]e to put
8 [you]." (Opp'n 2, Mar. 11, 2011, ECF No. 73; see Opp'n 6, Mar. 24,
9 2011, ECF No. 76.) Easter alleges that Panichello's lack of
10 recollection confirms that the lieutenant walked Easter to yard
11 four. (Opp'n 7, Mar. 24, 2011, ECF No. 76.)

12 **i. Sufficiently obvious risk**

13 The parties dispute the extent to which Plaintiff spoke to
14 Panichello about Easter's reluctance to be transferred back to yard
15 four. Plaintiff testified in his deposition that he told the
16 lieutenant that he should not be moved, and even though Panichello
17 had the authority to stop the transfer, he did nothing. (Opp'n 2,
18 Mar. 11, 2011, ECF No. 73; Mot. Summ. J. Attach. #3 App. Evidence
19 Ex. P, at 95, ECF No. 52.) Panichello knew Easter was concerned
20 about being rehoused in facility four, but the lieutenant said that
21 he was just following the rules. (Mot. Summ. J. Attach. #3 App.
22 Evidence Ex. P, at 95, ECF No. 52.) The Defendant was joined by a
23 few other officers who helped escort Plaintiff and the other
24 African-American inmates to yard four; the prisoners did not want to
25 go there because their enemies were still there. (Id.) "[W]e was
26 [sic] forced to go, because officers came up to our door and said
27 you guys are going to move. You gotta move." (Id.)

28

1 The Defendant does not recollect this exchange, but even if it
2 did occur, he asserts Easter did not specify a particular risk of
3 threat. (Id. Attach. #1 Mem. P. & A. 17.) Plaintiff testified in
4 his deposition that he was unable to give Panichello names of
5 enemies in yard four because he did not know them. (Mot. Summ. J.
6 Attach. #3 App. Evidence Ex. P, at 100, ECF No. 52.) Easter had
7 been told that the Caucasian inmates remained in yard four, but
8 Plaintiff and other African-American inmates had been placed in yard
9 two. (Id.)

10 The Supreme Court has held:

11 The question under the Eighth Amendment is whether
12 the prison officials, acting with deliberate indifference,
13 exposed a prisoner to a sufficiently substantial "risk of
14 serious damage to his future health," and it does not
15 matter whether the risk comes from a single source or
16 multiple sources, any more than it matters whether a
17 prisoner faces an excessive risk of attack for reasons
18 personal to him or because all prisoners in his situation
19 face such a risk.
20 Farmer, 511 U.S. at 843 (internal quotations omitted); contra
21 Williams v. Wood, 223 F. App'x 670, 671 (9th Cir. 1997) (affirming
22 dismissal because plaintiff did allege that he had been assaulted or
23 threatened by other prisoners; his "speculative and generalized
24 fears" of other inmates did not constitute a substantial risk of
25 serious harm).

26 Although the lieutenant asserts Easter's allegations are
27 inconsistent with Panichello's recollection, a trier of fact may
28 believe Plaintiff's version of the events and find that Defendant
had knowledge of and disregarded the risk of moving Easter to
facility four. See Bejarano, 2011 U.S. Dist. LEXIS 6180, at *19
(finding issue of fact where defendants' claim that plaintiff said
he "did not have any enemies" conflicted with plaintiff's statements

1 in a prison grievance). "Credibility determinations, the weighing
2 of the evidence, and the drawing of legitimate inferences from the
3 facts are jury functions, not those of a judge, whether he is ruling
4 on a motion for summary judgment or for a directed verdict."
5 Liberty Lobby, Inc., 477 U.S. at 255.

6 Moreover, as discussed above, plaintiff need not specifically
7 alert the defendant of the danger posed by a specific inmate to
8 establish an issue of fact. See Farmer, 511 U.S. at 849; Harper v.
9 Sheppard, 2000 U.S. App. LEXIS 2365, at *7 (9th Cir. Feb. 14, 2000)
10 (finding defendants' argument that plaintiff could not identify a
11 specific enemy inmate without merit); see also Broadway, 2009 U.S.
12 Dist. LEXIS 21132, at *18-19 (recommending denial of summary
13 judgment because prison official refused to confirm inferences of
14 risk that he suspected existed).

15 A prisoner may establish a serious risk of harm by
16 demonstrating he belongs to an identifiable group of inmates who are
17 frequently singled out by other inmates for violent attacks.
18 Farmer, 511 U.S. at 843. Given the facts, rational minds could
19 differ as to whether a substantial risk to Plaintiff's safety was
20 obvious to Panichello.

21 **ii. No reasonable justification**

22 Prison officials who know of a substantial risk to the inmate's
23 safety may escape liability if they responded reasonably. Thomas,
24 611 F.3d at 1150 (citing Farmer, 511 U.S. at 837). Staffing
25 considerations may constrain the options available to prison
26 officials. Berg, 794 F.2d at 461. "In deciding how to protect a
27 prisoner, officials may face a number of choices, each posing
28 potential dangers to the prisoner and others." Id. The record does

1 not establish, and Defendant Panichello does not allege, any
2 justifications for his conduct.

3 Viewing the facts in the light most favorable to Easter, a
4 material issue of fact exists as to whether this Defendant was aware
5 of a substantial risk to Plaintiff's safety and disregarded that
6 risk. Therefore, Lieutenant Panichello's Motion for Summary
7 Judgment regarding Easter's Eighth Amendment claim against him
8 should also be **DENIED**.

9 **c. Captain Morris**

10 The Plaintiff maintains that after he was transferred to yard
11 four, he repeatedly asked Captain Morris, both directly and
12 indirectly, to be transferred from facility four and assigned to a
13 different yard because Easter had enemies in that yard. (Opp'n 2,
14 Mar. 11, 2011, ECF No. 73; Opp'n 8, 10, Mar. 24, 2011, ECF No. 76.)
15 Additionally, Plaintiff contends that yard four was Morris's
16 assigned yard, and he knew that Plaintiff was never supposed to be
17 placed back in that yard. (Opp'n 2, Mar. 11, 2011, ECF No. 73.)

18 Captain Morris argues that when Easter requested that he be
19 transferred back to yard two, Morris asked if Plaintiff had safety
20 concerns in yard four, and Easter "denied having any safety issues."
21 (Mot. Summ. J. Attach. #1 Mem. P. & A. 18, ECF No. 52.) The captain
22 states that Plaintiff acknowledges that he did not communicate the
23 names of potential enemies to the Defendant. (Id.) Easter also
24 conceded that he "did not speak to defendant Morris in between the
25 two riots." (Reply 6, Apr. 7, 2011, ECF No. 77.) Finally, Morris
26 argues that "a generalized fear is insufficient to establish
27 liability." (Mot. Summ. J. Attach. #1 Mem. P. & A. 18, ECF No. 52
28 (citing Robinson v. Cavanaugh, 20 F.3d 892, 893 (8th Cir. 1994)).)

1 In response, Plaintiff asserts Morris has admitted that Easter
2 asked him to move Plaintiff out of yard four before the November
3 2006 riot. (Opp'n 8, Mar. 24, 2011, ECF No. 76.) Easter explains
4 that Morris refused to talk to him directly; instead, Morris would
5 send the housing officer to relay messages to the inmates. (Id.)
6 Plaintiff states, "That's why I said that I didn't talk to [Morris]
7 before the second riot." (Id.) When he talked to Morris to explain
8 that he and other inmates should be moved back to yard two where
9 they had "no enemies," the Defendant told Easter that Officer
10 William would talk to them. (Opp'n 2, Mar. 11, 2011, ECF No. 73.)
11 Plaintiff contends that William told Easter that he would be moved,
12 but William did not know where. (Id.)

13 **I. Sufficiently obvious risk**

14 The record suggests that on August 30, 2006, and again on
15 September 19, 2006, Captain Morris had actual knowledge of
16 Plaintiff's involvement in the first riot. The CDC-128G chrono
17 sheet dated August 30, 2006, lists Defendant Morris as a member of
18 the institutional classification committee and recounts the events
19 from Easter's in-person hearing with the committee. (Mot. Summ. J.
20 Attach. #3 App. Evidence Ex. E, at 12, ECF No. 52.) The chrono
21 states that Plaintiff was placed in administrative segregation on
22 August 27, 2006, because he participated in the riot. (Id.) The
23 chrono also states that Easter was assigned to a mixed exercise yard
24 with only African-American and Northern Hispanic inmates, and
25 Plaintiff had no enemy concerns on this yard. (Id.) On September
26 19, 2006, Captain Morris reviewed the rules violation report and the
27 action taken against Easter for his involvement in the August 2006
28 riot. (Reply Attach. #1, at 3, Apr. 7, 2011, ECF No. 77.)

1 Although Plaintiff did not specifically tell Morris that
2 inmate Hill posed a particular threat, the circumstances of the
3 August race riot were well known, and Easter's concerns should have
4 prompted Morris to take reasonable measures to protect Easter. See
5 Hearns v. Terhune, 413 F.3d 1036, 1041-42 (9th Cir. 2005) (quoting
6 Farmer, 511 U.S. at 842) ("The series of planned attacks and
7 religious-related violence at Calipatria State Prison was
8 'longstanding, pervasive, [and] well-documented.'"). Plaintiff was
9 not required to specifically identify the inmates who posed a threat
10 to present a genuine issue of fact. Farmer, 511 U.S. at 843; see
11 Hearns, 413 F.3d at 1041-42 (drawing the inference that defendants
12 were deliberately indifferent because they knew a group of Muslim
13 inmates had previously attacked plaintiff). A jury could find that
14 because Morris knew Easter was involved in the August 2006 riot on
15 yard four, ignoring Plaintiff's pleas to be moved created a
16 substantial risk of serious harm.

17 **ii. No reasonable justification**

18 Once a defendant becomes aware of a substantial risk of serious
19 harm, he must take the risk seriously and conduct appropriate
20 inquiries. See Madrid, 889 F. Supp at 1267 n.213. A prison
21 official is liable if he merely "declined to confirm inferences of
22 risk that he strongly suspected to exist" Farmer, 511 U.S.
23 at 843 n.8. There is no evidence that Morris asked Easter why he
24 should not be placed in yard four or that he checked Plaintiff's
25 inmate file to determine whether Easter had been involved in
26 altercations with inmates in yard four before. See Broadway, 2009
27 U.S. Dist. LEXIS 21132, at *18-19 (denying summary judgment to two
28 defendants who failed to take action in response to plaintiff's

1 safety concerns); see also Knight v. Lea, No. CIV S-07-0751-FCD-GMK-
2 P, 2009 U.S. Dist. LEXIS 58513, at *18-29 (E.D. Cal. July 9, 2009)
3 (granting summary judgment where plaintiff expressed his safety
4 concerns to defendants and they took reasonable steps to address the
5 concerns by removing plaintiff from the general population, placing
6 him in administrative segregation, and conducting an investigation
7 into the safety concerns).

8 The reasonableness of Captain Morris's justification for
9 failing to investigate Plaintiff's safety concerns or refusing to
10 remove Easter from facility four raises material issues of fact.
11 Accordingly, Defendant Morris's Motion for Summary Judgment should
12 also be **DENIED**.

13 **C. Qualified Immunity**

14 Defendants Perez, Panichello, and Morris argue that they are
15 each entitled to qualified immunity because they reasonably believed
16 that their conduct was lawful. (Mot. Summ. J. Attach. #1 Mem. P. &
17 A. 18, ECF No. 52.) Assuming Easter has adequately alleged an
18 Eighth Amendment claim against them, Defendants contend that
19 "reasonable officers in [their] positions would not have been on
20 notice that their conduct was unlawful." (Id. at 18-19.) They
21 believed their actions were lawful because Easter never expressed
22 safety concerns to any of them, neither Plaintiff nor inmate Hill
23 were involved in the August 2006 riot, and Hill was not identified
24 as an enemy of Easter. (Id. at 19.) The Defendants conclude that
25 it is "unclear how defendants would have been aware of this safety
26 concern." (Id.)

27 The correctional officers claim that their mental state is an
28 element of the purported constitutional deprivation. (Id. at 19-20

1 (citing Jeffers v. Gomez, 240 F.3d 845, 854 (9th Cir. 2001)).)

2 Easter must present facts illustrating that they acted, or failed to

3 act, with knowledge of a substantial risk of harm, and were

4 deliberately indifferent to that risk. (Id. at 20.) Defendants

5 contend, "There is no evidence that any of [us] acted with

6 deliberate indifference to plaintiff's safety, or with any intent

7 other than good faith, as demonstrated above." (Id.) Therefore,

8 Defendants Perez, Panichello, and Morris assert they are each

9 entitled to qualified immunity. (See id. at 18-20.)

10 In Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992), the

11 Ninth Circuit previously held that "[a] finding of deliberate

12 indifference precludes a finding of qualified immunity." Id. The

13 Supreme Court subsequently ruled that the qualified immunity inquiry

14 is independent from the constitutional inquiry. Saucier v. Katz,

15 533 U.S. 194, 202 (2001), overruled on other grounds by Pearson, 555

16 U.S. 223, 129 S. Ct. 808 (2009). The Ninth Circuit has reconsidered

17 Hamilton in light of Saucier. "[W]e conclude that Hamilton, which

18 collapses the deliberate indifference part of the constitutional

19 inquiry into the qualified immunity inquiry, has been undermined by

20 Saucier. Instead, courts must follow the Saucier framework." Ford

21 v. Ramirez-Palmer (Estate of Ford), 301 F.3d 1043, 1050 (9th Cir.

22 2002). Therefore, "Courts may not simply stop with a determination

23 that a triable issue of fact exists as to whether prison officials

24 were deliberately indifferent; instead, the qualified immunity

25 inquiry is separate from the constitutional inquiry, and courts must

26 undertake the qualified immunity analysis separately." Id. at 1053.

27 "[G]overnment officials performing discretionary functions,

28 generally are shielded from liability for civil damages insofar as

1 their conduct does not violate clearly established statutory or
2 constitutional rights of which a reasonable person would have
3 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified
4 immunity is immunity from suit for monetary damages, but it is not
5 immunity from suit for declaratory or injunctive relief. Hydrick v.
6 Hunter, 449 F.3d 978, 992 (9th Cir. 2006). It protects "all but the
7 plainly incompetent or those who knowingly violate the law." Malley
8 v. Briggs, 475 U.S. 335, 341 (1986).

9 When considering a claim for qualified immunity, courts engage
10 in a two-part inquiry: Do the facts show that the defendant
11 violated a constitutional right, and was the right clearly
12 established at the time of the defendant's purported misconduct?
13 Delia v. City of Rialto, 621 F.3d 1069, 1074 (9th Cir. 2010)
14 (quoting Pearson v. Callahan, 555 U.S. 223, ___, 129 S. Ct. 808,
15 815-16 (2009)). Courts consider whether, "[t]aken in the light most
16 favorable to the party asserting the injury, . . . the facts alleged
17 show the officer's conduct violated a constitutional right."
18 Saucier, 533 U.S. at 201. A right is clearly established if the
19 contours of the right are so clear that a reasonable official would
20 understand that what he is doing violates that right. Id. at 202
21 (quotation omitted). This standard ensures that government
22 officials are on notice of the illegality of their conduct before
23 they are subjected to suit. Hope v. Pelzer, 536 U.S. 730, 739
24 (2002) (quoting Saucier, 533 U.S. at 206). "This is not to say that
25 an official action is protected by qualified immunity unless the
26 very action in question has previously been held unlawful"
27 Id.

28

1 The Supreme Court recently found that the sequence of this two-
 2 step inquiry is no longer "an inflexible requirement." Pearson, 555
 3 U.S. at ___, 129 S. Ct. at 818. Thus, it is within the court's
 4 discretion to decide which step to address first. Id.; see Delia,
 5 621 F.3d at 1075 (citing Brooks v. Seattle, 599 F.3d 1018, 1022 n.7
 6 (9th Cir. 2010); Bull v. City & County of San Francisco, 595 F.3d
 7 964, 971 (9th Cir. 2010)). "If the Officers' actions do not amount
 8 to a constitutional violation, the violation was not clearly
 9 established, or their actions reflected a reasonable mistake about
 10 what the law requires, they are entitled to qualified immunity."
 11 Brooks, 599 F.3d at 1022 (citing Blankenhorn v. City of Orange, 485
 12 F.3d 463, 471 (9th Cir. 2007)); see James v. Rowlands, 606 F.3d 646,
 13 651 (9th Cir. 2010) (quoting Pearson, 555 U.S. at ___, 129 S. Ct. at
 14 816, 818).

15 In ruling on a motion for summary judgment based on qualified
 16 immunity, the court must decide the "'purely legal' issue of
 17 'whether facts alleged by the plaintiff support a claim of violation
 18 of clearly established law.'" Lytle v. Wondrash, 182 F.3d 1083,
 19 1086 (9th Cir. 1999) (quoting Mitchell v. Forsyth, 472 U.S. 511, 528
 20 n.9 (1985)). The court must view the facts in the light most
 21 favorable to the nonmoving party and determine whether the movant is
 22 nonetheless entitled to qualified immunity as a matter of law. Id.
 23 (citing Moran v. State of Washington, 147 F.3d 839, 844 (9th Cir.
 24 1998)).

25 **1. Violation of a Constitutional Right**

26 The Plaintiff maintains that Defendants Perez, Panichello, and
 27 Morris violated his Eighth Amendment right to reasonable safety and
 28 to be protected from violence while in custody. See Helling, 509

1 U.S. at 33. If the Defendants disregarded the known risk that
 2 Easter would be attacked by skin heads in facility four,
 3 nevertheless reassigned him to yard four, physically escorted him to
 4 facility four, and ignored Plaintiff's safety concerns once in yard
 5 four, the Defendants failed to safeguard Easter from the attack.
 6 See, e.g., Estate of Ford, 301 F.3d at 1050. A triable issue of
 7 fact exists as to whether the Defendants each deprived Easter of his
 8 Eighth Amendment rights. Even so, whether Easter's right to
 9 reasonable protection from attack was "clearly established" controls
 10 the qualified immunity inquiry.

11 **2. Whether the Right Was Clearly Established**

12 "Whether a right is clearly establishes turns on the 'objective
 13 legal reasonableness of the action, addressed in light of the legal
 14 rules that were clearly established at the time it was taken.'" Clouthier v. County of Contra Costa, 591 F.3d 1232, 1241 (9th Cir.
 15 2010) (quoting Pearson, 555 U.S. at ___, 129 S. Ct. at 822). "This
 16 is 'a two-part inquiry: (1) Was the law governing the state
 17 official's conduct clearly established? (2) Under that law could a
 18 reasonable state official have believed his conduct was lawful?'" Estate of Ford, 301 F.3d at 1050 (quoting Jeffers, 267 F.3d at 910);
 21 Browning v. Vernon, 44 F.3d 818, 822 (9th Cir. 1995).

22 First, the law governing the Defendants' conduct was clearly
 23 established. "Whether the right is clearly established in a
 24 particular case is judged as of the date of the incident alleged,
 25 and is a pure question of law." Phillips v. Hust, 338 F. Supp. 2d
 26 at 1162 (citing Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th
 27 Cir. 1993)). "[T]he right alleged to have been violated must not be
 28 so broadly defined as to 'convert the rule of qualified that our

1 cases plainly establish into a rule of virtually unqualified
2 liability simply by alleging violation of extremely abstract
3 rights.'" Cunningham, 229 F.3d at 1288 (quoting Anderson v.
4 Creighton, 483 U.S. 635, 639 (1987)). "On the other hand, . . . the
5 right can not be so narrowly construed so as to 'define away all
6 potential claims.'" Id. (quoting Kelley v. Borg, 60 F.3d 664, 667
7 (9th Cir. 1995)).

8 A prisoner's right to be protected from a substantial risk of
9 assault by other prisoners was clearly announced in Farmer, if not
10 before. See Farmer, 511 U.S. at 842-43. There, the Supreme Court
11 made clear that if a prison official knows of an excessive risk to
12 inmate safety, or infers from known facts that a substantial risk of
13 serious harm exists, he violates the law by disregarding the risk.
14 Id. at 835-36. In 2002, the Ninth Circuit reiterated that the right
15 was established by Farmer. Estate of Ford, 301 F.3d at 1050. Thus,
16 the right was clearly established.

17 Second, viewing the evidence in the light most favorable to
18 Easter, a reasonable prison official in the Defendants' positions
19 would believe that his or her conduct was unlawful. See id. at
20 1045. "The relevant, dispositive inquiry . . . is whether it would
21 be clear to a reasonable officer that his conduct was unlawful in
22 the situation he confronted." Saucier, 533 U.S. at 202. "If the
23 law did not put the officer on notice that his conduct would be
24 clearly unlawful, summary judgment based on qualified immunity is
25 appropriate." Id.

26 The Defendants argue that the law does not clearly define at
27 what point a risk of inmate assault becomes sufficiently substantial
28 for Eighth Amendment purposes. (Mot. Summ. J. Attach. #1 Mem. P. &

1 A. 19, ECF No. 52.) Defendants analogize this case to Estate of
2 Ford, where the Ninth Circuit held that it would not be clear to a
3 reasonable official when the risk of harm from double-celling
4 psychiatric inmates increases from "some" risk of harm to a
5 "substantial risk of serious harm." (Id. (citing Estate of Ford,
6 301 F.3d at 1051).) "Because plaintiff did not have an identified
7 safety concern on Facility IV, defendants reasonably believed they
8 could house plaintiff in that facility, and their actions were
9 lawful." (Id.)

10 "[G]ranted summary judgment on the ground of qualified
11 immunity is 'improper if, under the plaintiff's version of the
12 facts, and in light of the clearly established law, a reasonable
13 officer could not have believed his conduct was lawful.'" Martinez
14 v. Bryant, No. CV 06-5344-GW(AGR), 2008 U.S. Dist. LEXIS 11258, at
15 *26 (C.D. Cal. Dec. 12, 2008) (quoting Schwenk v. Hartford, 204 F.3d
16 1187, 1196 (9th Cir. 2000)). Moreover, this case is distinguishable
17 from Estate of Ford, which involved assigning two mentally ill
18 prisoners to the same cell, and one inmate eventually killed the
19 other. Estate of Ford, 301 F.3d at 1052-53. There, the two inmates
20 were not enemies, had no gang-related conflict, were not a
21 "predator" and "victim," had been previously celled together without
22 incident, and both inmates wanted to be celled together again. Id.
23 at 1052. The defendants did not ignore facts suggesting that
24 placing these two prisoners in the same cell posed a substantial
25 risk of serious harm to the deceased plaintiff. The Ninth Circuit
26 held that the defendants were entitled to qualified immunity. Id.
27 at 1053. In light of the circumstances each defendant faced, it
28 would not have been clear to a reasonable prison official that

1 double-celling the two inmates posed such a substantial risk of
2 serious harm that doing so would be unconstitutional. Id.

3 Here, in contrast, Easter's version of the facts illustrates
4 that he was not supposed to be housed with the Caucasian prisoners
5 in facility four. Plaintiff alleges, and the Defendants do not
6 produce evidence to rebut, that after the August 27, 2006 racial
7 riot, prison officials placed the Caucasian inmates in facility four
8 and placed the African-American inmates in facility two. (Mot.
9 Summ. J. Attach. #3 App. Evidence Ex. E, at 12, Ex. P, at 100, ECF
10 No. 52.) These inmates were segregated in response to the first
11 racial riot in yard four and should not have been routinely rehoused
12 together in that yard again. Cf. Estate of Ford, 301 F.3d at 1052.
13 Easter contends that these Defendants knew, either by reviewing his
14 central file or by communicating with him, that being assigned to
15 yard four with the skin head inmates who participated in the August
16 2006 riot posed a serious risk. Defendants' attempt to analogize
17 these facts to those in Estate of Ford is not persuasive.

18 "[I]n resolving a motion for summary judgment based on
19 qualified immunity, a court must carefully examine the specific
20 allegations against each individual defendant" Cunningham
21 v. Gates, 229 F.3d 1271, 1287 (9th Cir. 2000). "Reasonable
22 extrapolations of prior law to circumstances where it would have
23 been apparent to reasonable officers will suffice to determine
24 reasonableness in the particular circumstances." Barnes v. Denney,
25 No. CIV S-07-1380 GGH P, 2010 U.S. Dist. LEXIS 25251, at *61 (E.D.
26 Cal. Mar. 17, 2010) (citing Burke v. City of Alameda, 586 F.3d 725,
27 734 (9th Cir. 2009)).

28 //

1 **a. Officer Perez**

2 As to Officer Perez, summary judgment on the ground of
3 qualified immunity is only proper if, under Easter's version of the
4 facts, a rational officer in Perez's position could not have
5 believed her conduct was unlawful. Martinez, 2008 U.S. Dist. LEXIS
6 11258, at *26.

7 After considering "all pertinent information," a rational
8 officer would have understood that keeping Easter in yard four with
9 purported members of the skin heads gang was unconstitutional. See
10 Swan, 159 F. Supp. 2d at 1182 (turning a blind eye to relevant facts
11 does not allow an official to escape liability); see also Farmer,
12 511 U.S. at 842 (finding defendant must have known about risk when
13 the risk of inmate attacks was documented and defendant was exposed
14 to the information).

15 A reasonable housing assignment officer would have known that
16 assigning Plaintiff to housing in the same prison yard in which a
17 racial riot had taken place roughly one month before with a large
18 number of Caucasian inmates, some of which were still housed in yard
19 four, would pose a substantial risk of serious harm. Cf. Estate of
20 Ford, 301 F.3d at 1052. Likewise, failing to transfer Easter from
21 yard four would pose a substantial risk of serious harm. Id. It
22 would also have been clear that Easter was entitled to protection
23 from inmates with whom he allegedly had a gang-related conflict.
24 Officer Perez is not entitled to qualified immunity.

25 **b. Lieutenant Panichello**

26 Defendant Panichello is also not entitled to summary judgment
27 on this ground. Viewing the evidence in the light most favorable to
28 Easter, a reasonable official would know it was unlawful to ignore

1 an inmate's express reluctance to be moved to a certain prison yard
2 and to refuse to investigate the prisoner's concerns. See Madrid,
3 889 F. Supp at 1267 n.213 (citing Farmer, 511 U.S. at 843 n.8)
4 (explaining that once a defendant becomes aware of a risk, he must
5 consider the risk seriously and conduct appropriate inquiries). At
6 the time the conduct occurred, the law was that a prison official is
7 liable if he refused to verify facts he suspected were true, or
8 declined to confirm inferences of risk that he thought existed. Id.
9 Moreover, the law clarified that an inmate need not identify the
10 specific enemy that posed the particular threat. Farmer, 511 U.S.
11 at 843; Harper, 2000 U.S. App. LEXIS 2365, at *7. While escorting
12 Easter and others to facility four and in response to Easter's
13 express concerns, Defendant Panichello did nothing beyond informing
14 Plaintiff that the prison had nowhere else to place him. This was
15 insufficient to confer qualified immunity.

16 **c. Captain Morris**

17 Finally, a reasonable officer in Captain Morris's position
18 would know that failing to respond to a prisoner's pleas to be
19 removed from a prison yard where he had been implicated in a racial
20 riot without investigating the inmate's concerns was unlawful. See
21 Madrid, 889 F. Supp at 1267 n.213 (citing Farmer, 511 U.S. at 829
22 n.8).

23 Captain Morris admits Easter communicated his safety concerns.
24 Defendant asked Plaintiff for the names of those who threatened his
25 safety, but Morris concedes he did nothing further when Easter was
26 unable or unwilling to provide the names of specific enemies housed
27 in facility four. Under these circumstances, Defendant Morris
28 should not be entitled to qualified immunity as a matter of law.

1 See Broadway, 2009 U.S. Dist. LEXIS 21132, at *6, 28-29
2 (recommending qualified immunity be denied where, in 2005, a prison
3 officer merely asked plaintiff for names of inmates he feared and
4 failed to investigate further).

5 **d. Conclusion**

6 The general law regarding claims arising under the Eighth
7 Amendment for the failure to protect was clearly established at the
8 time of the Defendants' alleged violations. The purpose of summary
9 judgment is to avoid unnecessary trials when there is no dispute
10 over the facts before the court. Northwest Motorcycle Ass'n v. U.S.
11 Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). Upon
12 resolution of the factual issues in dispute, the Defendants may be
13 relieved of liability. But if Plaintiff's version of events
14 prevails at trial, a jury might conclude that the Defendants knew of
15 and disregarded substantial risks of harm to Easter. Under such
16 circumstances, the Defendants' actions are not protected by
17 qualified immunity, and summary judgment on this ground is
18 inappropriate. The district court should **DENY** the Defendants'
19 Motion for Summary Judgment based on qualified immunity.

20 **VI. CONCLUSION**


21 The Court construes Defendants' Motion for Summary Judgment on
22 exhaustion grounds as a nonenumerated motion to dismiss under
23 Federal Rule of Civil Procedure 12(b). The Defendants' request that
24 the Court dismiss Plaintiff's claims for failure to exhaust should
25 be **DENIED**. The Plaintiff's request to conduct additional discovery
26 to oppose Defendants' Motion is **DENIED**.

27 Viewing the evidence in the light most favorable to Plaintiff,
28 a genuine issue of material fact exists as to whether Easter was

1 confined under conditions that posed a substantial risk of serious
2 harm. An issue of fact also exists as to whether each Defendant was
3 aware of a serious risk to Plaintiff's safety and disregarded that
4 risk. The district court should **DENY** Defendants' Motion for Summary
5 Judgment as to Easter's Eighth Amendment claim. Additionally, the
6 Defendants contend that they should be shielded from liability on
7 the basis of qualified immunity. For the reasons stated, their
8 Motion for Summary Judgment based on qualified immunity should also
9 be **DENIED**.

10 This Report and Recommendation will be submitted to the United
11 States District Court judge assigned to this case, pursuant to the
12 provisions of 28 U.S.C. § 636(b)(1). Any party may file written
13 objections with the Court and serve a copy on all parties on or
14 before July 22, 2011. The document should be captioned "Objections
15 to Report and Recommendation." Any reply to the objections shall be
16 served and filed on or before August 12, 2011. The parties are
17 advised that failure to file objections within the specified time
18 may waive the right to appeal the district court's order. Martinez
19 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: June 29, 2011


Ruben B. Brooks
United States Magistrate Judge

22 cc: Judge Burns
23 All Parties of Record

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